No. 16-4300, No 17-1054

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MID-ATLANTIC RESTAURANT GROUP,

Petitioner

V.

NATIONAL LABOR RELATIONS BOARD,

Respondent

BRIEF FOR PETITIONER/CROSS-RESPONDENT and JOINT APPENDIX VOLUME I of III (1a-19a)

Petition for Review of the November 30, 2016 Order of the National Labor Relations Board, Case No. 04-CA-162385

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STATEMENT OF ISSUES PRESENTED

1. The process was rendered fundamentally unfair by General Counsel's willful misrepresentations to Counsel and the ALJ by purposefully concealing both actual time frame of the complaint and evidence until commencement of trial at which time they quadrupled the timeframe of the complaint and added an additional supervisor.

2. The ALJ and the NLRB considered several items outside the scope of the Complaint despite the ALJ's clearly ruling during the hearing that he would not consider such evidence.

3. The ALJ and NLRB's finding of concerted activity in this matter was clear error as Robin Helm's activities, the seeking of the best shifts for herself, were to her benefit alone and to the detriment of her co-workers, thus in no way concerted activity.

4. The ALJ and NLRB's findings that Robin Helms' termination was for impermissible reasons, and that Petitioner's reason for termination were pretextual, is not supported by substantial evidence and impermissibly failed to consider the actual record.

STATEMENT OF CASE

Petitioner/Cross-Respondent[1], by and through its undersigned counsel, and pursuant to 3d. Cir. L.A.R. 28.1, hereby files the following Brief in Support of its Petition for Review of the November 30, 2016 Decision ("Decision") and Order ("Order") of the National Labor Relations Board ("the Board"), in Case No. 04-CA-162385, which affirmed the June 13, 2016 Decision of Administrative Law Judge Mark Carissimi (the "ALJ"). For the reasons stated herein, this Honorable Court should reverse the Order, dismiss the underlying Complaint, and dismiss the Board's Petition for Enforcement of the Order.

[1] **Petitioner will refer to Petitioner as either "Petitioner," "Mid-Atlantic" or "Kelly's."**

STATEMENT OF JURISDICTION

The National Labor Relations Board possessed subject matter jurisdiction pursuant to 29 U.S.C. § 160(c). This Court has jurisdiction to review the Board's November 30, 2016 Decision and Order pursuant to 29 U.S.C. § 160(f). Mid-Atlantic Restaurant Group filed a timely petition for review on December 12, 2016. App. 1a.

STATEMENT OF FACTS

Petitioner/Cross-Petitioner presented multiple, independent witnesses, reams of evidence and scores of facts that proved Robin Helms was out herself, individually, and that her firing was not a part of her self-serving, unsupported testimony, but as a result of an incident of blatant racism. Furthermore, the ALJ made specific and clear rulings on the record that, in the ALJ's effort to support Robin Helms, he then impermissibly ignored in his decision.[2]

The Complaint in this matter consisted of six paragraphs that gives virtually no information about the claims at issue. The only claim made regarding protected activity that remained after amendment at the hearing was "[i]n March and April of 2015, Petitioner's employees, including Robin Helms openly complained about shift schedules." Complaint at 4(a); (Tr. at 11:16-12:4). There is not a single other employee specifically mentioned therein. The Complaint only identifies three individuals, Gene and Angelia Mitchell and Ryan Henry, as supervisors and managers within the meaning of Sections 2(11) and 2(13), respectively, within the act. Petitioner filed an answer denying the claim that Ms. Helms engaged in protected activity and denying that she was discharged due to any protected activity. See Petitioner's Answer and Affirmative Defenses.

[2] **The Petitioner will reference the Decision of the ALJ in this matter simply as the "Decision." App. 39a-65a.**

Petitioner also filed a motion for a bill of particulars due to the extremely bare bones nature of the Complaint. The Government vehemently opposed Petitioner's motion, which ultimately was denied. See App. 29a-37a. Petitioner and the Government then engaged in a series of no less than three conference calls with the ALJ[3] during which both Petitioner and the ALJ, commenting on the anemic nature of the Complaint, directly asked the Government's Counsel if there was additional information regarding the conduct, timeframe and allegations, contained in the Complaint. The Government repeatedly assured both the ALJ and Counsel that there was not and that the Government was relying on the information contained in the Complaint.

At Trial, General Counsel, ***in near beginning of their case in chief***,[4] blindsided Petitioner by quadrupling the time frame of the Complaint, and identifying an additional individual, who they sought to classify as a supervisor under the act. Additionally, the Government identified additional, previously unnamed individuals who allegedly joined Ms. Helms' "complaints". (Tr. at 35:19-25) ("[N]ow we have essentially started the hearing and we are essentially jackpotted with this information when it's clearly supposed to be stated in the

[3] ALJ Carissimi was assigned to this case on the eve of the hearing, replacing the original ALJ assigned to this matter. ALJ Carissimi was not the ALJ that conducted the conference calls.

[4] It is important to note that General Counsel sought to introduce these new date and supervisor almost immediately in their case-in-chief, not as a part of a rebuttal case or a heat of the moment trial decision made in response to an assertion or witness by Petitioner.

complaint...[s]o we would object to any kind of identification of this individual as fitting within the Act because the statements will come to be attributed to our clients, which runs afoul completely to the rules of procedure.").

Petitioner noted for the record that the introduction of undisclosed persons to be considered as supervisors or agents was completely improper. (Tr. at 46:5-49:14) ("This is an individual not named in the complaint and also for a time frame not contained in the complaint. The prejudice is enormous and our issue isn't so much with agreeing with the government's contention that she is a manager, I'll stipulate that she is. It is what flows from that and the severe prejudice my client has."). The Court in addressing General Counsel with regard to Ms. Lang, the previously unnamed supervisor, stated "there are no unfair labor practices attributed to Ms. Lang [but] you're going to contend in your brief that she is in fact a supervisor and any statements she makes, if I were to credit Ms. Helms' testimony, are admissions against inference against the Petitioner. Am I correct, sir?." (Tr. at 51:1-11). General Counsel acknowledged this was the case and the Court stated "[s]o that is the case...[a]nd so consequently it would have been better in my view if the Petitioner had been notified that that is someone who you are claiming to be a supervisor and agent, and they could have prepared more adequately prior to the hearing." (Tr. at 51:11-16). The Court made crystal clear that anything that was not mentioned in the Complaint would be found by the

Court to be an unfair labor practice. (Tr. at 52:25-53:5). Petitioner relied on this clear ruling was shocked to see the ALJ's findings where a large basis of the ruling for the finding of concerted activity, one of the key issues in the case, was based upon the very conduct and facts the ALJ said he would not consider.

A. Robin Helms' Unsupported and Contradictory Testimony

Robin Helms was hired by Mid-Atlantic in March of 2014. (Tr. at 16:10-11). Ms. Helms admits that she desired to work Thursday, Friday, and Saturday and that those were the "lucrative shifts." (Tr. at 17:15-18:5). Ms. Helms claimed she was "frustrated" over the scheduling of hours and alleged "inconsistency, lack of knowledge of when I would be working in the next couple of days." (Tr. at 19:21-23; 20:20-26). Her frustration started at "the very end of my stay with Kelly's, very much late March, April" and that prior to that "I was generally happy with it." (Tr. at 21:1-9).

Ms. Helms discussed her co-worker and offered unreliable hearsay testimony about Kris Flood's statements that her schedules were shifted for complaining. (Tr. at 24:6-11). General Counsel made no effort to call Ms. Flood as a witness and subsequent testimony established that Ms. Flood still works for Petitioner and has received a promotion. (Tr. at 261:10-15). Ms. Helms testified that she approached Ryan Henry with her concerns about scheduling in April 2015 and she was allegedly told not to bring those concerns to Gene and Angie Mitchell,

the owner and manager of Kelly's. (Tr. at 24:20-25:24). As noted below, this is entirely inconsistent with the testimony of all other witnesses, as well as the physical evidence.[5]

Ms. Helms then testified about her and Ms. Flood allegedly complaining to Ryan Henry about scheduling in light of new hires in March of 2015. (Tr. at 54:18-56:2). Ms. Helms stated that she, Kris Flood, and Sarah Clark (who left Kelly's voluntarily upon graduating from Villanova and moving to New York) "were concerned that these new employees would be given the prime shifts." (Tr. at 57:5-25). Ms. Helms admitted that with the staffing changes, Kelly's "absolutely" needed to hire people. (Tr. at 141:11-12; 140:1-3).

Ms. Helms, in regard to a conversation with Mr. Henry, stated she was concerned about receiving her "prime spots" and again claimed that she was told not to contact Gene and Angie Mitchell. (Tr. at 60:4-11; 60:16-61:4). Ms. Helms testified that she was concerned about the new hires taking "our shifts." (Tr. at 114:5-8). Ms. Helms also testified that certain shifts were preferred by bartenders because tended to be more lucrative. (Tr. at 118:8-119:25). Ms. Helms stated that her concerns were that she had "done a lot of favors" and she "wanted to make sure that that had earned me the better, more lucrative shifts." (Tr. at 98:16-24).

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[5] Ms. Helms contradicted her prior testimony that she was generally happy with scheduling prior to March/April of 2015 and stated that a previous manager named Kristen Lang, which was also not called as a witness, also stated that contacting Gene and Angie Mitchell was discouraged. (Tr. at 26:14-24).

Ms. Helms further admitted that despite her concerns, she was still getting scheduled for the "choice shifts" in April 2015, the month of her termination. (Tr. at 138:22-24).

Ms. Helms testified she was fired in a meeting in which she was told by her employer that her complaining was the problem and it had "hurt their feelings." (Tr. 64:1-65:16). As discussed *infra.,* the meeting with Ms. Helms was the result of her refusal to serve an African American patron. Ms. Helms then claims that upon defending her job performance, Ms. Mitchell "said that none of that mattered to them…[t]hat they are a small family business and my hurting their feelings mattered more than my actual job performance." (Tr. at 68:8-16). Ms. Helms then completely denied that the issue of refusing to serve an African American patron ever was discussed at the meeting, despite every other person present at the meeting testifying to the contrary, as shown below. (Tr. at 127:3-16; 128:24-129:1). Ms. Helms even admitted that such an accusation was something she would remember. (Tr. at 133:9-16).

Ms. Helms did not offer any physical evidence in support of her testimony. Ms. Helms admitted to having contact information for many persons she worked with at Kelly's and, yet, not one of her co-workers was called to testify in support of her story. (Tr. at 104:1-10; 105:1-8).

B. The Testimony of Petitioners and Numerous Disinterested Witnesses as Well as Supporting Physical Evidence.

Gene and Angie Mitchell are the Owner and Manager respectively of Mid-Atlantic Restaurant Group, which operates Kelly's Tap Room. (Tr. at 156:12-5); (Tr. at 174:15-17). Kelly's Tap Room is "just an individual family bar." (Tr. at 245:19-21).

i. Shift Scheduling.

Mr. Mitchell acknowledged that there were occasionally concerns about shifts and Ms. Mitchell said she was aware of Robin Helms and Kris Flood having concerns about scheduling in April of 2015, but not Chris Healy or Sarah Clark. (Tr. at 176:7-177:2); (Tr. at 159:7-25). Mr. Mitchell also clarified that scheduling is about bartenders wanting to maximize their profits. (Tr. at 173:2-10).

Mrs. Mitchell stated with regard to her managers' decisions "I have to make sure that if the policy, or if a decision is made, it affects everybody the same way and it doesn't bring other people down." (Tr. at 248:22-249:6). As to shift scheduling, Mrs. Mitchell testified that scheduling is done weekly based on everyone's availability and the managers balance out everyone's needs and requests. (Tr. at 249:20-250:17). The most lucrative shifts are Thursday, Friday,

and Saturday, and that Ms. Helms typically worked those days while she was employed at Kelly's. (Tr. at 255:16-256:11).

Mrs. Mitchell hired three new people in Spring 2015 as a result of two bartenders leaving and experiencing issues with scheduling. (Tr. at 259:15-260:18). In the end, all bartenders want the best shifts, not everyone can have them, and some have to work the "crappy shifts." (Tr. at 173:2-10); (Tr. 359:18-360:2).

ii. Robin Helms' Solely Self-Interested Conduct.

Testimony from numerous witnesses and former co-workers regarding Ms. Helms was completely consistent: Ms. Helms was only ever out for herself and herself only. Mr. Mitchell stated that Ms. Helms' never brought anything to his attention about people other than herself. (Tr. at 171:5-11); (Tr. 285:8-20). Mrs. Mitchell testified that Ms. Helms was always advocating on her own behalf and not others. (Tr. at 264:5-18); (Tr. at 355:16-21).

Ms. Heyward, an independent witness, said Ms. Helms "was stressed out about new hires, that she wasn't really happy perhaps with the new hires, like myself, being there…[and] she needed to talk to the management about making sure that it did not affect ***her scheduling*** whatsoever." (Tr. at 187:1-8) (emphasis added). Ms. Heyward also said that Ms. Helms stated that if she found out the new hires were getting certain shifts and she was not, she would be "really pissed off

about it." (Tr. at 188:4-12); (Tr. at 190:9-24). Ms. Heyward also testified that Ms. Helms' complaints were always directed at her own interest. (Tr. at 199:18-25).

Mr. Stedeford testified that Ms. Helms' complaints were relating to her only. (Tr. at 370:14-18). Mr. Bevevino also said that never knew Ms. Helms to go to management on behalf of others and that her complaints were relating to Ms. Helms only. (Tr. at 360:18-23). Mr. Henry also stated that Ms. Helms' complaints were solely about her and not others. (Tr. at 382:22-383:1).

iii. Robin Helms' Lies About Being Unable to Talk to the Mitchells and Her Unacceptable Behavior.

Mr. Mitchell explained that the managers are tasked generally with handling matters so as to not overwhelm the Mitchells, "[b]ut if there was ever a problem that the manager was not addressing, either properly or…punctually, there was open lines of communication." (Tr. at 282:4-17).

Mrs. Mitchell testified that she has told every employee that she has an open door and provides her cell phone and e-mail to employees. (Tr. at 248:4-7); (Tr. at 249:7-17). Petitioner admitted e-mails Ms. Mitchell received from her staff during Robin Helms' employment showing approximately 102 pages of contacts between employees and Mrs. Mitchell about scheduling issues. (Tr. at 332:21-22). Mrs. Mitchell testified that no one was ever punished or reprimanded for approaching her with these issues. (Tr. at 333:7-10). Petitioner also admitted approximately 25

pages of text messages between Mrs. Mitchell and her staff regarding scheduling issues. (Tr. at 336:1). These were only the ones that Mrs. Mitchell was able to print out because there were too many overall.[6] (Tr. at 336:4-10).

Mr. Stedeford, Mr. Bevivino, and Mr. Henry, all current or former employees of Petitioner, all confirmed that they never had any problems approaching Gene and Angie Mitchell with issues. (Tr. at 371:1-13); (Tr. at 361:13-20); (Tr. at 381:17-382:6).

Angie Mitchell stated she did get complaints from people that worked with Ms. Helms in that "[t]hey said she complained a lot [and] she was negative, and they didn't want to work with her." (Tr. at 255:16-19). There were individuals that requested to not be scheduled with Ms. Helms because of Ms. Helms' complaining. (Tr. at 257:3-17). Mr. Mitchell testified further that Ms. Helms' complaining affected employee morale though it was not specifically about shift schedules. (Tr. at 163:5-10).

iv. Robin Helms' Racist Actions.

Mr. Mitchell, the owner of Petitioner, was told about the incident involving Ms. Helms refusing to serve an African-American patron and making racially

[6] As stated in Court and in supra, the bare bones nature of the Complaint, in even its most favorable reading for the Government, did not provide notice that there were complaints about communication issues with Mr. and Mrs. Mitchell and their employees. As such, Counsel and the witness worked through the night after the first day of trial to print out emails and text messages to completely disprove this absurd statement. However, due to the time constraints, Counsel was unable to print out all, or even close to all, of the communications between Mr. and Mrs. Mitchell and their staff.

charged statements to fellow employee Chelsea Heyward (an African-American employee) by Mrs. Mitchell. (Tr. at 288:9-16).

Mrs. Mitchell spoke to Chelsea Heyward, an employee hired in April 2015, when she quit and she said to Mrs. Mitchell that Ms. Helms "was mean to her and said these nasty things" and that "Robin Helms is a racist." (Tr. at 265:19-266:3; 266:8-13). Ms. Heyward recounted an incident involving Ms. Helms in which two African-American girls came into Kelly's Tap Room and Ms. Helms "recognized them and she basically said that she was not going to serve them, that they never tipped her, and so she refused to give them service." (Tr. at 191:16-18). Ms. Heyward stated that Ms. Helms "basically just said I'm not waiting on those two black girls and was like if you want to wait on them you can but I'm not going to do it...[and] I went over and I waited on them." (Tr. at 191:23-25). When Ms. Heyward reported to Ms. Helms that the girls actually tipped her well, Ms. Heyward testified as follows:

> And [Ms. Helms] said to me, well, it must be because you're black, too. And I said that's really ridiculous. And then I just kind of like shoved it underneath how I felt about it because I felt like for you to tell a black girl that you're not going to wait on two other black people, I would think that you would know that that would be offensive to me whether you didn't or not. So when she told me the only reason I probably got tipped by them was because I was also black, too, ***the whole situation was offensive.***

(Tr. at 192:7-15) (emphasis added). Ms. Heyward found that Ms. Helms apparently "had no problems making racist comments in front of an African

American person without thinking twice about it." (Tr. at 192:21-22). Ms. Heyward specifically testified that in talking to Mrs. Mitchell about Ms. Helms she said "I raised the issue with the two girls that came in that I felt like [Helms] really clearly wasn't paying attention that her comments were to a black girl about not wanting to wait on black people." (Tr. at 196:17-25).

Mrs. Mitchell was very "upset" and Ms. Heyward said that this "kill your business" if others do this. (Tr. at 266:15-267:19). Mrs. Mitchell was concerned about the potential reaction from the community if an incident like refusing to serve an African-American patron became well known and if Kelly's became known as a racist establishment, it would have "killed" the business. (Tr. at 268:7-11). In addition, the business and ethical concerns, it put Kelly's in an awkward legal position in that Mrs. Mitchell "immediately thought Chelsea could sue me today probably for a racist remark to a minority employee." (Tr. at 269:18-20). Ms. Heyward didn't want to be identified so Mrs. Mitchell planned to lie to Ms. Helms about how she knew about the incident to protect Ms. Heyward. (Tr. at 269:3-270:7). Mr. Mitchell testified regarding the incident:

> It was definitely minority discrimination in my mind, which was alarming to say the least. I mean, it's alarming that we're not serving patrons. But it gets to a whole nother [sic] level and degree of escalation in my mind when it involves an African American minority. And particularly as it pertained to Chelsea because she's also African American. And generally speaking, we thought she was good for our business, so it was a concern…[o]bviously, we don't condone discrimination. The reverberations in the community for an event like that should it have been gotten to a higher level is very difficult to

> overcome. I mean, in any business. So that's a concern. So there was a moral ethical concern on my part. And there was business concern on my part. There was a concern because a good individual was leaving the company because of this issue, so it was on several different levels.

(Tr. at 288:7-289:4). When Mr. and Mrs. Mitchell spoke of this incident there was no discussion about complaints regarding shift schedules and Mr. Mitchell determined that they needed to address the issue with Robin. (Tr. 289:16-24).

Mr. Mitchell explained his concerns about fellow employees as follows:

> It's not a good working environment. It's, how would [African-American employees] feel, I mean, if they felt like one of their colleagues that they're part of a team with is refusing service to another African American ... I was concerned that they would find another good place to work. They're valuable employees. If they realized that one of their team members and coworkers was refusing service to another African American, that's a concern for me. It's not a good working environment.

(Tr. at 310:8-311:12).

General Counsel even went so far to combat this blatant racist behavior by Robin Helms to suggest that racism was not a big deal in that area, which is silly and offensive. (Tr. at 305:9-12; 306:4-9) ("Have you -- isn't it true that Villanova's nickname is Vanilla Nova?"); (Tr. at 347:11-12) ("Q: Is it correct that the overwhelming majority of the customers of Kelly's are Caucasian?").

v. The Termination Meeting

When Mr. and Mrs. Mitchell spoke of Ms. Helms' racist actions, after they were reported by Chelsea, there was no discussion about complaints regarding shift schedules and Mr. Mitchell determined that they needed to address the refusal to

serve an African American with Robin. (Tr. 289:16-24). The intent of the meeting with Ms. Helms to address the complaints about her and the incident with Ms. Heyward (Tr. at 290:12-25; 291:1-11). The meeting involved Ms. Helms, Mrs. Mitchell, Mr. Mitchell, and Ryan Henry, although Mr. Mitchell arrived a few minutes late. (Tr. at 272:16-20).

In the meeting, Mr. Mitchell recalled Ms. Helms said "[y]ou're right. I should have left a couple weeks ago. I can't take it anymore" and Mr. Mitchell said to her "[o]kay, I guess we're done here." (Tr. at 292:4-19). Mr. Mitchell confirmed that there was no discussion of shift schedules and that issue was absolutely not in his mind when the decisions were made. (Tr. at 293:4-16). After Ms. Helms acknowledged her unhappiness, Mr. Mitchell said "at that point, to me, that was a mutual understanding that this was no longer a place for her to work" and he left the meeting. (Tr. at 293:23-294:2).

Mrs. Mitchell testified that Ms. Helms confirmed that she was not happy and admitted denying service to a patron after initially denying it. (Tr. at 271:23-272:9). Mrs. Mitchell said to Ms. Helms "I have a lot of people that come in here that are black…[a]nd this lady happened to be black…[a]nd you said it to a black coworker." (Tr. at 272:10-12). According Mrs. Mitchell, Mr. Mitchell stated "I can't have this, you're unhappy, we're unhappy, we can't run a business like this…[y]ou shouldn't be working here if you're this unhappy." (Tr. at 272:20-25).

Mr. Mitchell said Ms. Helms cannot work at Kelly's if she is unhappy because incidents like the one at issue are what happen and Ms. Helms said "Okay." (Tr. at 273:14-19). There was no mention in this meeting about shift scheduling by anyone. (Tr. at 273:4-10).

Mrs. Mitchell was a little taken aback:

> '[b]ecause nobody went -- we didn't meet at the anticipation of it ending that way. It evolved that way, and when she said she's unhappy, she admitted she didn't serve the lady. And it was more, it felt to me like a mutual separation...[y]ou're unhappy, we're unhappy, these are what happened, let's just part ways. So it was a stunning moment that I didn't expect it to go that way. I didn't know that meeting was going to go like that. But it did. So I stayed so to listen.

(Tr. at 274:1-13). Mr. Mitchell also clearly testified that Ms. Helms' complaints about shift scheduling absolutely did not factor in the decision to terminate her employment. (Tr. at 171:21-172:1).

Mr. Henry was present at the meeting where Ms. Helms was separated from Kelly's Tap Room. (Tr. at 380:4-25). Mr. Henry testified:

> So I was asked to get Robin Helms, not knowing what the topic was. I brought her down to the office. There were some questions about behavior specifically relating to at one point discriminatory acts regarding race. I was listening to that conversation. At that point when she was asked about that specific piece about race, she had agreed that she had, how do I put it, done that act, I guess. And from there she was let go. And I was witness to that.

(Tr. at 381:5-12). As to the reason Ms. Helms was let go Mr. Henry stated "I believe it was directly tied to the discriminatory act...[r]egarding race." (Tr. at 381:13-16).

The testimony of all parties was that four individuals were at Ms. Helm's termination meeting: Mr. and Mrs. Mitchell, Ryan Henry and Ms. Helms. Although each of the Mr. and Mrs. Mitchell and Ryan Henry, recalled the meeting slightly differently, they are completely consistent as to the reasons for Ms. Helm's termination, the racist incident involving Chelsea Heyward. Ms. Helms produced no witness, or evidence, in support of her claims that she was fired either for shift scheduling or hurting people's feelings.

vi. The ALJ's Decision and Board's Rubber Stamp

The ALJ made an erroneous and incoherent decision that was completely unsupported as discussed below. See App. 39a-65a. Petitioner sought review of this issue, submitting a fifty-page brief in support if its exceptions to the NLRB, raising the four issues contained herein, citing to specific testimony and case law in support of its position. App. 74a-124a. Furthermore, Petitioner sought oral argument on the matter. In reply, the Government submitted a four paragraph, page and a half brief citing no testimony and nearly any case law, which failed to address any of the issues raised by Petitioner. App. 127a-131a. Petitioner understands that quantity does not necessarily equate to quality, however, even a cursory review of the Government's filing makes clear the deficiency of its filing. The Board, apparently satisfied that the Government's brief adequately addressed the issues at hand, denied Petitioner's request for oral argument and rubber

stamped the decision of the ALJ with no additional analysis whatsoever. See 3a-19a.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The National Labor Relations Board has cross-petitioned this Court for enforcement of the Board's November 30, 2016 Order. This matter is docketed at 17-1054 in this Court.

SUMMARY OF THE ARGUMENT

This Court should reverse the Order of the National Labor Relations Board and dismiss the Complaint as the Petitioner was denied even the most minimal protection of due process and a fair hearing, both by General Counsel's willful misrepresentations and withholding of known evidence, as well as the ALJ considering evidence in its decision that he specifically stated he would not. Despite these issues, the testimony clearly demonstrated that the conduct alleged by Government does not come close to the definition of "concerted activity", rather, the conduct at issue was the very definition of self-serving behavior. The ALJ's decision is against the clear weight of the evidence, requiring a tortured interpretation of the testimony and physical evidence, disregarding vast amount of uncontradicted evidence in an effort to support a finding for Ms. Helms.

Specifically, the Government's Complaint is a six-paragraph document that provides virtually no information about its allegations against Petitioner. Petitioner filed a Bill of Particulars to which the Government object. It was denied. General Counsel and Petitioner engaged in a series of phone calls which both the ALJ and Petitioner asked if there were additional time frames, witnesses and facts, not detailed in the Complaint. General Counsel told both the ALJ and Petitioner there was no additional information whatsoever. Then, at the beginning of the Government's case in chief, General Counsel quadrupled the timeframe of the

Complaint and added an additional supervisor. Despite the ALJ clearly ruling that he would not consider this additional evidence, he did precisely the opposite, relying on it in great deal in finding a violation by Petitioner.

Despite these significant procedural issues, the Government utterly failed to prove that Ms. Helms engaged in any "concerted activity", in even the most expanded definition of the term. Ms. Helms testimony was that she complained to a manager because she wanted to ensure that she, rather than other co-workers, was scheduled for the most lucrative bartending shifts. The ALJ's decision that since Ms. Helms was complaining about "scheduling" then it is "concerted activity" is fatally flawed as Ms. Helms complaints sought to help on person: Robin Helms. The conduct of Ms. Helms falls far outside the defintion of "concerted activity".

At the hearing the Government called one person, Robin Helms, and presented no supporting evidence. In contrast, Petitioner brought in scores of witnesses, including disinterested parties, and volumes of evidence in support of its position. These witnesses all testified consistently and were supported by the physical evidence, each witness, as well as the physical evidence, contradicted Ms. Helms on every critical point. The ALJ's decision completely ignored all of this evidence. Rather, the ALJ engaged in an at times illogical evaluation, at other times simply dismissed evidence as inconsistent or unsupported with no explanation, in finding for Ms. Helms.

II. ARGUMENT

The Petitioner here simply asks for a fair review of the evidence in this matter, something that Petitioner asserts has simply not occurred yet.

A. Standard of Review

When a party challenges a Board determination that it engaged in an unfair labor practice, the Court is bound to accept the Board's factual findings only if they are supported by "substantial evidence." Stardyne, Inc. v. N.L.R.B., 41 F.3d 141, 151 (3d Cir. 1994) citing 29 U.S.C. § 160(e). A decision of the Board rests on substantial evidence if a reasonable jury could have come to the same conclusion. Citizens Pub'g & Printing Co. v. N.L.R.B., 263 F.3d 224, 232 (3rd Cir. 2001). Substantial evidence is more than a mere scintilla, it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 477 (1951). The reviewing Court may set aside a Board decision when it cannot conscientiously find the evidence supporting the decision is "substantial," when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. Id.

Furthermore, a reviewing court must ascertain if errors of law were made by the Board. Delaware River Stevedores, Inc. v. Director, Office of Workers' Compensation, 279 F.3d 233, 241 (3rd Cir. 2002). Additionally, errors of law are

reviewed by the court *de novo.* Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Auth., 464 U.S. 89, 97 n. 7 (1983); 5 U.S.C.A. § 706 ("[T]he reviewing court shall decide all relevant questions of law").

B. The Government's Willful Tactics, Resulted in a Fundamentally Unfair and Unjust Process

As stated above, the charging documents in this gave scant information about the claim. Furthermore, the Government's willful actions after the filing of the Complaint purposefully hindered the discovery of any additional information regarding the actual scope and facts at issue in the hearing.

The Complaint[7], is six paragraphs long that provides the following facts about the alleged violations: "in March and April, 2015, Respondent's employees, including Robin Helms, openly complained about shift schedules and the loss of pay resulting from the malfunctioning of Respondent's computer system." Complaint at 4(a). The only people listed as supervisors of Respondent, pursuant to National Labor Relations Act, were Mr. and Mrs. Mitchell and Ryan Henry.

On account of the lack of information contained in the Complaint, as well as the inability of Petitioner to locate any evidence regarding either the computer malfunctions and individuals, filed a Motion for a Bill of Particulars seeking additional information regarding the allegation of concerted activity. See App.

[7] It should be noted that both Mr. and Mrs. Mitchell provided statements to the Government prior to the issuance of the Complaint, both expressed that they had absolutely no knowledge of Ms. Helm's claim of termination predicated upon complaints regarding shift schedules or any other concerted activity.

29a-32a. The Government vehemently objected to Petitioner's motion, which was ultimately denied. App. 33a-37a.

Counsel for the Government and Petitioners engaged in a series of conference calls with the ALJ, both for scheduling and discussion of a potential resolution. A topic raised, by both Petitioner's Counsel and the ALJ, during each call, was the barebones and scant nature of the Government's Complaint. The ALJ repeatedly asked the Government if there was going to be additional conduct, timeframe or allegations outside of those contained in the Complaint. Each time the Government firmly and directly answered the question in the negative, going as far as to say that they would be reducing, rather than expanding, the issues in the Complaint, ultimately removing the allegations regarding the computer malfunctions. Petitioner, through motions and involvement of the ALJ, did everything it could to determine what, if any, additional information would be introduced at the hearing. Several of the persons that factored heavily in the decision of the ALJ, including Kristen Lang, Kris Flood, and Sarah Clark were not mentioned anywhere and Petitioner could not have known about them in order to have an opportunity to call them as witnesses.

General Counsel, without amendment and at the very outset of their case in chief, ***quadrupled*** the timeframe of the Complaint. They then went on to identify additional supervisors, going as far as to request Petitioner stipulate that the

individual was a supervisor as defined by the act. (Tr. at 35:19-25). This information and expanded time frame was done without amendment and at the very outset of the Government's case, not in response to evidence presented by Petitioner or as the result of an unexpected turn in the hearing. Thus, the Government was clearly aware of this information prior to the hearing as well as planned to use it, to Petitioner's detriment.. The fact that this was purposely withheld deprived the Petitioner of the most basic fairness at the heart of the rules of procedure. See Swift & Co. v. U.S., 308 F.2d 849, 852 (7th Cir. 1962) ("Due process in an administrative hearing, of course, includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law."). As a matter of fundamental fairness, the Complaint and supporting documents must provide adequate notice of the charges against a party. See Curtiss-Wright Corp., Wright Aeronautical Div. v. N. L. R. B., 347 F.2d 61, 72 (3d Cir. 1965) ("The propriety of a pleading is today judged by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought.").

Petitioner's Counsel also specifically objected to the tactics of General Counsel in this matter and the effect it had on Petitioner's ability to prepare the case. Petitioner noted for the record that the introduction of undisclosed persons to be considered as supervisors or agents was completely improper. (Tr. at 46:5-

49:14) ("This is an individual not named in the complaint and also for a time frame not contained in the complaint. The prejudice is enormous and our issue isn't so much with agreeing with the government's contention that she is a manager, I'll stipulate that she is. It is what flows from that and the severe prejudice my client has."). The Court in addressing General Counsel with regard to Ms. Lang, the previously unnamed supervisor, stated "there are no unfair labor practices attributed to Ms. Lang [but] you're going to contend in your brief that she is in fact a supervisor and any statements she makes, if I were to credit Ms. Helms' testimony, are admissions against inference against the Petitioner. Am I correct, sir?" (Tr. at 51:1-11). General Counsel acknowledged this was the case. As shown above, the ALJ made crystal clear that anything that was not mentioned in the Complaint would be found by the Court to be an unfair labor practice.

The ALJ acknowledges in a footnote that he stated in the proceeding that allegations not contained in the Complaint would not be considered regarding previously undisclosed supervisor Kristen Lang. See Decision at n.3. Without explanation, and in direct contrast to its ruling, the ALJ then spends half of his decision considering, and relying upon, those very things. See Decision at 3-4, 7-8, 17-18. In fact, entire sections of the Decision reference issues occurring long before the time periods alleged in the Complaint. See Decision at 3-4; 7; 19.

The prejudice to Petitioner in this respect is enormous. The consideration of these items with no notice whatsoever to Petitioner and ***in direct contrast to the ALJ's clear ruling*** (upon which Petitioner reasonably relied) that they would not be considered rendered the entire process fundamentally flawed.

Government, it is anticipated, will argue that the ALJ offered Petitioner the time to submit evidence regarding the Lang issue. This misses the mark for two reasons. First, and most importantly, the ALJ ruled that such evidence would not be considered in its finding of a violation, a ruling that Petitioner (rightfully) relied upon, which the ALJ ignored. In short, there is no need to meet the evidence if it is not being considered. Second, the offer to allow time (putting aside the issue regarding the ALJ's ruling) to bring in evidence does not remedy the Government willfully hiding witnesses and evidence.

Furthermore, in the Government's response to Petitioner's Motion for a Bill of Particulars and the denial thereof, there was much discussion that Petitioner should know and have access to information regarding Robin Helms' claims. This position makes the assumption that Ms. Helms claims are valid and that the incidents actually took place. If they incidents took place as Ms. Helms asserts they did, then the position that Petitioner "should be aware of them" has validity, as Petitioner is aware of how those events transpired. However, if Ms. Helms manufactured the facts surrounding her termination, then the Petitioner would have

no reason to know of facts and circumstance surrounding incidents, as they did not occur. This is analogous to the Government telling a criminal defense attorney requesting discovery in a homicide trial that the Government is not producing any discovery, rather, the lawyer should ask his/her client what happened because "they did it." While this may work if the client did, in fact, commit the crime, it does nothing to help the attorney if his client is innocent and, as such, completely unaware of the facts surrounding the crime. Although an extreme example, it is no less ridiculous here to expect Petitioner to anticipate what story Robin Helms was going to tell. This matter should be overturned and dismissed on this basis alone.[8]

C. The Finding Concerted Activity in this Matter is So Far-Fetched That It Strains the Definition to a Breaking Point

As an initial matter, it must be remembered that this is an NLRB proceeding and it is directed toward organized labor activities. General Counsel's burden at trial in this matter was to prove the existence of concerted activity by a "preponderance of the testimony taken ... and must establish its case by substantial evidence." 29 U.S.C. §160(c); Hanlon & Wilson Co. v. N.L.R.B., 738 F.2d 606, 610 (3rd. Cir. 1984). In order to establish "concerted activity" under the Act, this Court has held there must be some past and future plan for "group action"

[8] At the very least the matter should be re-tried due to the enormous prejudice to the Petitioner resulting from the above.

regarding a term and condition of employment. Mushroom Transportation Co. v. N.L.R.B., 330 F.2d 683, 685 (3d. Cir. 1964); Tri-State Truck Service, Inc. v. N.L.R.B., 616 F.2d 65, 71 (3d. Cir. 1980). Specifically, this Court stated with regard to concerted activity under the Act that:

> Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere 'griping.'

Mushroom Transportation, 330 F.3d at 684-685. General Counsel's burden at trial in this matter was to prove the existence of concerted activity by a "preponderance of the testimony taken ... and must establish its case by substantial evidence." 29 U.S.C. §160(c); Hanlon & Wilson Co. v. N.L.R.B., 738 F.2d 606, 610 (3d. Cir. 1984).

This matter conclusively involved the entirely self-interested actions of **one** employee. There must be some link between the employee complaining and other employees for the activity of the employee cannot be said to be covered by the protections of the NLRA. See Snyder v. Dietz & Watson, Inc., 837 F. Supp. 2d 428, 454 (D.N.J. 2011) ("An individual's action, even if presumably of interest to other employees, is not in itself 'concerted activity' under the NLRB."). This Court recently decided the case of MCPc, Inc. v. N.L.R.B., 813 F.3d 475, 484-86 (3rd Cir. 2016) and that case involved the issue of what constitutes "concerted activity."

The MCPc case stated that "the touchstone for an individual's concerted activity…remains whether the employee intends to induce group activity or whether the employee's action bears some relation to group action in the interest of the employees." See id. at 484. The Court also clarified that "[a]lthough merely complaining in a group setting would surely not be sufficient in itself to transform an individual grievance into concerted activity, …in such circumstances a lack of prior planning does not foreclose a finding of concerted activity, where the individual's statements **further a common interest or by their terms seek to induce group action in the common interest.**" See id. at 485 (emphasis added). The Court concluded that "[w]hen synthesized, the relevant precedent from our Court and the Board reflects that ***the benchmark for determining whether an employee's conduct falls within the broad scope of concerted activity is the intent to induce or effect group action in furtherance of group interests.***" See id. at 486. (emphasis added). Thus, it must proven that activity in this case was directed toward group action or common interests. The evidence in this matter was ***entirely*** to the contrary.

The evidence in this matter shows conclusively that Ms. Helms was simply complaining about her own position and interests done in an effort to secure, for herself, the most lucrative shifts. Everyone, including Ms. Helms, acknowledges that shift scheduling is an issue because some shifts as bartenders are more

lucrative than others. (Tr. at 118:8-119:25) (Ms. Helms' testimony); (Tr. at 173:2-10). The reason is obvious, bartenders that work the same number of hours during a shift that is more lucrative will bring home a higher hourly wage than an individual who works the same amount of time during a less lucrative shift. It logically follows that if Robin Helm's lobbying for the lucrative shift was successful, it would have been to the detriment of her co-workers. Ms. Helms would have secured the slot for the lucrative shift and she would have brought home more money while one of her co-workers would be stuck working the less lucrative shift and, as such, bring home less money. Simply put, if Ms. Helms was successful in her pleas she would make more, and others would make less; this the very definition of acting in one's own self-interest and to the detriment of others.

Ms. Helms' conceded her self-dealing thought process when she testified that her concerns were essentially whether or not the new hires would take her "preferred" shifts. (Tr. at 98:16-24). Ms. Helms admitted that it was necessary to hire people at Kelly's and therefore cannot claim that the hiring of new employees itself was the issue. (Tr. at 141:11-12). Ms. Helms' "concerns" were therefore entirely regarding keeping "preferred" shifts for herself. In fact, every witness testified that they were aware of Ms. Helms' complaints and that those complaints were related to her alone. See (Tr. at 355:16-21) (Angie Mitchell); (Tr. at 360:18-

23) (Mike Bevevino); (Tr. at 382:22-383:1) (Ryan Henry); (Tr. at 378:1-7) (Robert Stedeford); (Tr. at 199:18-25) (Chelsea Heyward).[9]

Given the above fact it is impossible for her complaints to be "group activity" or address "common interests" such that they could be concerted activity under the Act. One who is lobbying for more for themselves and less for others cannot be said to be lobbying for a common interest (there was no evidence presented that Ms. Helms' coworkers desired that she have the most lucrative shifts, which could potentially give grounds for a finding of concerted activity). The ALJ and General Counsel both **entirely** failed to address this critical and undisputed point.

The ALJ's Decision makes almost no reference to the actual facts of the case cited above regarding concerted activity. The ALJ primarily cited the case of Aroostook County Regional Opthalology Center, 317 NLRB 218 (1995), but in that case, at least four employees were admittedly complaining about certain scheduling and working changes, all four were discharged, and the complaints related to items common to all four employees. See id. at 220-21.

The ALJ also cited two cases which even further distance the facts of this case from "concerted activity." Both the case of Meyers Industries, Inc., 268

[9] **The only employees mentioned by Ms. Helms were Kris Flood and Sarah Clark, neither of whom Ms. Helms called as a witness. It is undisputed that neither of these employees were dismissed or even disciplined in any way. (Tr. at 261:2-15); (Tr. at 286:10-16). Undercutting any notion that Petitioner dismissed people on account of their complaints regarding the schedule.**

NLRB 493 (1984) and Worldmark by Wyndham, 356 NLRB 765 (2011), both confirm that concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees ***bringing truly group complaints*** to the attention of management." (emphasis added).

It is important to note, given the case cited by the ALJ, what Ms. Helms did ***not*** do in her complaints to management. She did not ask for a system to be implemented that would result in everyone receiving, at some point during a rotation, a guaranteed lucrative shift, nor did she lobby for some form of seniority scheduling system. Ms. Helms' complaints were that ***she*** wanted to retain ***her*** lucrative shifts. This important distinction takes this case far outside of the cases cited by the ALJ.

The decision of the ALJ in essence finds that because Ms. Helms raised complaints about "scheduling" with others that the activity is clearly concerted but this simply does not go far enough. This analysis fails to take the important next step. Simply saying that she complained about "scheduling" with others is not enough, as the act does not mandate, nor is there any caselaw to support, that the simple mention of "scheduling" automatically and without question invokes the protections of the Act. Rather, the inquiry must ask whether the issues raised about scheduling were personal or in furtherance of group interests. The

undisputed evidence shows that Ms. Helms' complaints, at best, amount to her advocating for her and no one else to receive the "preferred" shifts for herself. It would require an extreme expansion of the definition of "concerted activity" to find this kind of necessarily self-interested griping was intended "to induce or effect group action in furtherance of group interests" as required to fit within the definition of concerted activity.

The ALJ and the Board clearly failed to review the "whole record" in this matter, thus casting doubt on how its finding could be supported by "substantial evidence." See Universal Camera Corp., 340 U.S. at 488. Indeed, as in Tri-State Truck Service, Inc., the record appears to be more than sufficient to cast "serious doubts" on the ALJ's decisions regarding credibility and adequacy of evidence, thus requiring this Court to reverse the Decision and Order. Id., 616 F.2d at 70-71; See also Delco-Remy v. National Labor Relations Board, 596 F.2d 1295, 1304-1305 (5th Cir. 1979) (reversing Board's decision after finding that ALJ made multiple "conclusory credibility choices, noted "contradictory statements" but failed to account for the same in credibility determinations, and generally failed to have "sufficient evidence" to support the finding of a violation of the Act). The evidence in this matter shows nothing but the sort of purely personal griping that does not fit within the definition of "concerted activity." See Rockwell Int'l Corp.

v. N.L.R.B., 814 F.2d 1530, 1535 (11th Cir. 1987) ("Purely personal griping does not fall within the scope of protected, concerted activity.").

The errors of law committed by the Board and ALJ are as evident as their failure to properly review all evidence, as the Board and ALJ's clearly failed to apply the standard articulated in MCPc, Inc.. In light of the same, there is more than sufficient evidence that the ALJ and Board committed an error of law by failing to apply the correct standard for a finding of "concerted activity," and further committed an abuse of discretion by finding a violation of the Act without "substantial evidence" to support that Helms engaged in concerted activity under the Act. As such, dismissal of the Complaint is warranted.

D. The Decision of the ALJ and the Board is not supported by *any* evidence, much less the required "substantial evidence."

Even where there is protected activity engaged in by an employee, the fact-finder must still determine that the employee's discharge was related to that protected activity in order to find in the employee's favor. This Court in MCPc, Inc. stated that "[w]here an employer argues that it discharged the employee for reasons unrelated to his protected activity, such as tardiness or poor work performance, we rely on the so-called 'mixed motive' or 'dual motive' discharge test set forth by the Board in *Wright Line*." See MCPc, Inc., 813 F.3d at 487-88 (citations omitted). Under the *Wright Line* Test, the employee must make a prima facie showing that protected conduct was a "motivating factor in the employer's

decision" and, if that is shown, "the burden shifts to the employer to demonstrate that the 'same action would have taken place even in the absence of the protected conduct.'" See id. This test is designed to "preserve what has long been recognized as **the employer's general freedom to discharge an employee 'for a good reason, a poor reason, or no reason at all**, so long as the terms of the [Act] are not violated.'" See id. (emphasis added).

There was absolutely no evidence presented, save Ms. Helms' self-serving testimony, that Ms. Helms' dismissal was related in any way to protected activity, Petitioner presented overwhelming evidence that Ms. Helms was terminated as a result of an incident of racism at the establishment and that the alleged concerted activity, assuming for arguments sake that there was such activity, played no part in the decision to separate from Ms. Helms.

Prior to a discussion about the testimony about the incident regarding racism, it is important to note the testimony Ms. Helms gave regarding the reason she was fired. Ms. Helms testified that during the meeting which led to her separation from Kelly's she defended her job performance, however, Mrs. Mitchell "said that none of that mattered to them…[t]hat they are a small family business and my hurting their feelings mattered more than my actual job performance." (Tr. at 68:8-16). Even if one accepts this absurd statement, then by Robin Helms own account, she was terminated for hurting her boss' feelings. Therefore, even under

Ms. Helms' testimony, she was not fired for complaints about shift scheduling, but rather for offending her boss. The ALJ, despite buying completely into Robin Helms' unsupported and implausible story, fails completely to address this incredibly important point. With this said, however, the evidence clearly demonstrated that Ms. Helms was let go as a result of an incident of blatant racism.

There is a mountain of evidence that Ms. Helms' termination had nothing to do with any alleged "protected activity." Chelsea Heyward offered testimony that Ms. Helms made racist statements and refused to serve African-American customers. Ms. Mitchell and Ms. Heyward both testified that there was phone conversation relaying this incident to Ms. Mitchell. It is ***undisputed*** that Ms. Heyward relayed this incident to Mrs. Mitchell, Ms. Heyward has no interest in this case to cause her testimony about the incident to be suspect, as she is no longer employed in any fashion by Petitioner.

The meeting to terminate Ms. Helms was attended by four individuals: Mr. and Mrs. Mitchell, Ryan Henry and Ms. Helms. Every witness there, save Ms. Helms, testified that the meeting was in regard to the incident of racism involving Chelsea Heyward as shown above. No person at the meeting corroborates Ms. Helms' assertion that she was dismissed for any protected activity. In fact, Ryan Henry, a disinterested witness, no longer employed by Petitioner, specifically

testified that Ms. Helms was dismissed as a result of the Chelsea Heyward incident involving racism. (See Tr. at 381:5-16).

Despite the fact that the testimony of every witness, other than Robin Helms, details a very clear incident of racism (Chelsea Heyward), a report of the racist conduct (Chelsea Heyward and Mr. and Mrs. Mitchell) and a meeting regarding and focused on the racist conduct (Ryan Henry and Mr. and Mrs. Mitchell) which led to Ms. Helms dismissal, at which no issue regarding any protected activity was discussed (Ryan Henry and Mr. and Mrs. Mitchell) the ALJ's decision credits, in its entirety, Ms. Helms' testimony. A majority of the ALJ's decision to do so is based upon bald assertions of "inconsistencies" and statements that the testimony was not "corroborated." At times, the ALJ simply makes these conclusions without stating upon what basis he makes such a determination and, at times, he makes them when they are clearly incorrect.

The ALJ attempts to claim there are inconsistencies in Heyward and Mitchell's testimony regarding this phone call but makes absolutely no attempt to state what those inconsistencies are. See Decision at n. 16. In reality, both Mitchell and Heyward testified completely consistently that Heyward told Ms. Mitchell that Robin Helms refused service to a black customer and made what Heyward felt were racist statements. (Tr. at 196:17-25); (Tr. at 266:8-267:1). Mrs. Mitchell was quite legitimately concerned that Ms. Heyward could have filed suit

against Petitioner due to this incident. (Tr. at 269:18-20) (Mrs. Mitchell "immediately thought Chelsea could sue me today probably for a racist remark to a minority employee.").

The ALJ, for reasons that are completely unexplained, fails to credit undisputed testimony from Angie Mitchell stating that Ms. Heyward told her about the incident involving an African-American patron stating simply: "Mitchell's testimony is not corroborated by Heyward in important respects...." See Decision at n. 16. The ALJ does not enumerate what those important respects might be, but the actual record shows that Mrs. Mitchell and Ms. Heyward say precisely the same thing about this phone call.

Ms. Heyward specifically testified that in talking to Mrs. Mitchell about Ms. Helms she said "I raised the issue with the two girls that came in that I felt like [Helms] really clearly wasn't paying attention that her comments were to a black girl about not wanting to wait on black people." (Tr. at 196:17-25). Mrs. Mitchell testified that Ms. Heyward said to her that Ms. Helms "was mean to her and said these nasty things" and that "Robin Helms is a racist." (Tr. at 266:8-13). Mrs. Mitchell relates that Ms. Heyward said Ms. Helms refused service to a black customer and said "you know, you can't not serve somebody because they're black." (Tr. at 266:15-267:1). One wonders how those statements are inconsistent, but what is entirely undisputed when they are examined is that

Chelsea Heyward, an African-American woman, reported to Angie Mitchell the general manager of Petitioner that she was quitting in part due to Robin Helms' conduct and that Robin Helms had acted in a blatantly racist manner.

The ALJ finds that the timing of Ms. Helms' discharge after her "protected complaints" was circumstantial evidence of relation. See Decision at 21. The timing actually falls in favor of Petitioner as the next time Ms. Helms came in after Ms. Heyward's report was when her termination occurred. Without any explanation, the ALJ concludes that the "complaints" Robin Helms made sometime in March or April, rather than the racist incident that directly preceded her separation, was the reason for her dismissal. It is uncontradicted that the phone call between Mrs. Mitchell and Chelsea Heyward immediately preceded the meeting at which Robin Helms was separated from Petitioner and it is completely nonsensical that it would have nothing to do with the separation.

In contrast to the ALJ's mistaken assertion that there is no credible evidence that Robin Helms was told about the issues leading to her discharge, as shown above, all the evidence suggests that. The case cited by the ALJ does not stand for proposition he cites it for. In that case, the employer admitted that he never told anyone, including the employee, the issues claimed to be at the heart of the dismissal. See D & F Industries, 339 NLRB 618, 622 (2003). That is completely different from this case where it is undisputed that Ms. Helms and others were told.

In this matter, according to the testimony of the three people at the termination meeting other than Ms. Helms, Ms. Helms acknowledged that she failed to serve a patron and that she was not happy and burnt out. (Tr. at 291:1-11); (Tr. at 292:4-19); (Tr. at 271:23-272:9); (Tr. at 272:10-19); (Tr. at 272:20-25); (Tr. at 381:5-16). Mr. Mitchell, who is the ultimate decision-maker at Kelly's, determined that it was best to separate given these issues as noted above. It is notable that Mr. Mitchell, who is the owner of Kelly's, testified clearly that he never even considered any complaints Ms. Helms was making at the time of his decision. (Tr. at 293:4-16). Mrs. Mitchell and Mr. Henry, who is a neutral party, both testified consistently that Ms. Helms' termination had nothing to do with her "complaints" about shift scheduling. (Tr. at 381:5-16).

This is incredibly significant because this Court has previously found that "before an employer can be charged with a section 8(a)(1) violation, it must have knowledge, or reason to know, that the employee activities have coalesced into group action for mutual aid or protection." See Tri-State Truck Service, Inc., 616 F.2d at 71. Ms. Helms admitted she never talked to or communicated with Mr. or Mrs. Mitchell about scheduling issues. (Tr. at 125:10-25). There was no evidence of any kind presented that the decisionmaker, i.e. Mr. Mitchell, had any knowledge of Ms. Helms' complaints, much less that they potentially coalesced into group

action. This is fatal to Ms. Helms' claim under the law and the ALJ and Board entirely failed to consider it.

The ALJ's determination to credit the version of events given by Robin Helms in the termination meeting is also steadfastly against the weight of the evidence. The simple fact is that four people were involved in that meeting in some fashion and only Robin Helms told the story she told. In contrast, the three others testified that the meeting was in regard to the racist incident involving Chelsea Heyward. Most importantly, none of the witnesses at the meeting, including Ryan Henry, a disinterested party to this action, offer testimony consistent, in any way, to Robin Helms.

In addition, all witnesses for Petitioner testified about Ms. Helms' negative attitude and how it was affecting other employees. Mrs. Mitchell confirmed that this was another reason why the Mitchells felt the need to meet with Ms. Helms about her issues. (Tr. at 290:12-25). Chelsea Heyward also confirmed that she felt Robin Helms' negative attitude was affecting the working environment. See, e.g., (Tr. at 199:1-17) (Ms. Heyward testifying that upon Ms. Helms leaving "all the negativity was gone and it completely changed into an environment where I actually mentioned to the people who were working with me if it had initially been that kind of environment that I wouldn't have left"). The other persons that worked

with Ms. Helms who testified also described the difficulty in working with her. See, e.g., Tr. 369:22-370:3; 359:6-360:6.

Certainly, Petitioner is entitled to address a negative attitude of an employee if it is affecting others. Copper River of Boiling Springs, LLC, 360 NLRB No. 60, 13-14 (2014) (affirming decision to discharge employee for displaying a "negative attitude" that was disruptive or had a negative impact as not violative of the Act). The ALJ cites a portion of Petitioner's handbook that gives the right to discipline "criticizing, condemning, or complaining in a manner that affects employee morale." See Decision at n. 11. The ALJ entirely sidesteps the testimony about Robin Helms' negative attitude, simply acts as if it does not exist, and makes no effort to justify this omission.

It is important to note that the ALJ rested a great deal of his credibility determinations on the fact that Petitioner's witnesses did not present lock step, verbatim testimony, rather the witnesses offered slightly different, although fundamentally similar, versions of the events. This helps, rather than hurts, the witnesses' credibility. If the story and facts were manufactured, then the witnesses would have had to get together and concoct a story, which would have resulted in the same "story" being repeated over and over. When a situation is observed, rather than manufactured, then individuals will view such situations from their own point of view and perspective, and testify from that point of view and perspective.

This adds credibility to the witnesses' story. On the other hand, the ALJ credits the fact that the Government called no one to support Ms. Helms, as there was no one to offer inconsistent testimony (other than all of the witnesses called by Petitioner) to Ms. Helms. Rather than viewing the Government's lack of supporting testimony or evidence as a cause for pause and concern, the ALJ viewed this as a strength.

The ALJ and the Board give no explanation for why they entirely failed to address the significant contradictions and problems with Robin Helms' testimony. In fact, ALJ states that General Counsel's case rested "in large part on the testimony of Helms." See Decision at 2. This is a false statement in that General Counsel's case rested entirely on the testimony of Helms and the ALJ failed address the severe problems with her testimony as explained herein. The ALJ went so far as to discredit everything that everyone else said that conflicted with Robin Helms' story without any actual support.

While an ALJ's credibility determinations are typically afforded weight, when they are completely unjustified and clearly and unequivocally against the weight of the evidence, as they are here, they can be overridden. See Standard Dry Wall Products, 91 NLRB 544 (1950) enf'd 188 F.2d 362 (3rd Cir. 1951). This case is analogous to this Court's determination in N.L.R.B. v. New York-Keansburg-Long Branch Bus Co., Inc., 578 F.2d 472, 478 (3rd Cir. 1978) where this Court

found that the ALJ's credibility determinations were unsupported and inconsistent with the evidence. This Court stated:

> In this circuit "(t)he final determination of credibility rests with the Administrative Law Judge as long as he considers all relevant factors and sufficiently explains his resolutions."...An analysis of the entire record satisfies us that this standard has not been met in this proceeding. First, in relying almost exclusively on testimonial evidence to support his decision, the ALJ failed to provide us with the required explanation for his credibility determinations. It is critical to our review that we be furnished with more than generalized characterizations of witnesses who were "honest", "unconvincing" or "not impress(ive)", where no record basis for these characterizations appear. This failure to articulate the basis of a credibility determination is even more disturbing where, as is evident here, substantial discrepancies exist in the testimony of various witnesses who testified in support of the Union's position...Second, crucial undisputed documentary evidence contained in the record...cannot be reconciled with, and completely undermines, the testimony credited by the ALJ.

Id. at n.15. That is precisely what the ALJ did in the instant matter and it was an abandonment of his duties under the law.

General Counsel did not call **any** of the fellow employees mentioned as witnesses to corroborate Ms. Helms' story. The judge may weigh the General Counsel's failure to call an identified, potentially corroborating bystander as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred. See Queen of the Valley Hospital, 316 NLRB 721 n. 1 (1995). As it was, every other person that testified, testified that Ms. Helms' issues were hers alone and that she always was only concerned about her shifts. See (Tr. at 355:16-21) (Angie Mitchell); (Tr. at

360:18-23) (Mike Bevevino); (Tr. at 382:22-383:1) (Ryan Henry); (Tr. at 378:1-7) (Robert Stedeford); (Tr. at 199:18-25) (Chelsea Heyward). General Counsel's failure to call **a single other person** and that all other evidence was against her suggests that there cannot be "substantial evidence" supporting the finding.

Not only did the testimony of every witness contradict Ms. Helms, the physical evidence did as well. This fact is demonstrated in abundant clarity during the testimony regarding the ability for workers to contact the Mitchells. Ms. Helms testified that she was unable to or was discouraged from contacting the owner and manager of Kelly's Gene and Angie Mitchell regarding scheduling or complaints. Every other witness in this matter refuted that assertion and stated that Gene and Angie Mitchell are approachable and have an open door. See, e.g., (Tr. at 381:17-382:6); (Tr. at 361:13-20); (Tr. at 371:1-13). In further support of this position, Petitioner admitted e-mails Ms. Mitchell received from her staff during Robin Helms' employment showing approximately 102 pages of contacts between employees and Mrs. Mitchell about scheduling issues. (Tr. at 332:21-22). Petitioner also admitted approximately 25 pages of text messages between Mrs. Mitchell and her staff regarding scheduling issues. (Tr. at 336:1). The ALJ flippantly stated that these messages reflect "routine notifications such as being late for work or covering the shift of another employee." See Decision at 21. What is astounding about this statement by the ALJ is that, in his attempt to

dismiss and discredit the emails, he undermines his own determination of the evidence. The aforementioned ruling acknowledges that the communications were about shift coverage and showing up for shifts, which cuts directly against Ms. Helms assertion that employees were discouraged and unable to contact Gene and Angie Mitchell regarding these issues. This highlights the illogical and unsupported nature of the ALJ's credibility determinations.

The contradiction of Ms. Helms' testimony does not stop at the physical evidence, it was also directly contradicted by two witnesses, Michael Bevevino and Ryan Henry. Ms. Helms alleged that both of these individuals had discouraged her from contacting Gene and Angie Mitchell with complaints. When Mr. Bevevino and Ryan Henry actually testified, they testified completely opposite regarding the approachability of the Mitchells. See (Tr. at 361:13-20); (Tr. at 381:17-382:6). Mr. Bevevino and Mr. Henry have no relationship to any party in this case and both of them directly contradicted Robin Helms' story of not being able to go to Gene and Angie Mitchell.

The ALJ's treatment of the testimony of Chelsea Heyward is also emblematic of how illogical the determinations were in this matter. Most damning and telling is the "finding" that the ALJ tries to bury in footnote. In footnote 9 of the ALJ's opinion, he credits a portion of Chelsea Heyward's testimony to find that a meeting between Helms, Kris Flood, and Ryan Henry occurred in mid-April

instead of in March as Ms. Helms testified to. See Decision at n. 9. This is absolutely stunning in the ALJ later discredits portions of Heyward's testimony that support Petitioner's case. However, where Heyward's testimony helped Ms. Helms by correcting something Ms. Helms "got wrong", it was credited by the ALJ. There was no mention of the fact that this shows Ms. Helms recall of events was not as perfect as the ALJ purports them to be. To put it simply, the ALJ credited every portion of Ms. Helm's testimony that helped her case, discredited any portion that hurt her case, then discredited all of Ms. Heyward's testimony with the exception of crediting any part that helped Ms. Helm's case. The ALJ credits just enough of Heyward's testimony to save face for Robin Helms. See Decision at 10.

Even the ALJ had to admit that Heyward would not have invented the incident about failing to serve an African American customer or the racist statements made an African-American co-worker, but still found that Ms. Helms did not refuse to serve an African-American customer even though Ms. Heyward testified as such, and has absolutely no reason whatsoever to lie for Petitioner. So in a nutshell, when Ms. Heyward helps Ms. Helms, she is believable, but when she helps Petitioner, she is not believable. This is the kind of abandonment of duties that occurred in N.L.R.B. v. New York-Keansburg-Long Branch Bus Co., Inc. and it cannot be allowed if the NLRB process is to have any integrity whatsoever.

The ALJ also states without reason that the "fact that the Mitchells created an elaborate fiction regarding the installation of listening devices at the restaurant is indicative of their untrustworthiness as witnesses" and that he does not accept the completely logical explanation that they wanted to keep Ms. Heyward's name out of it. See Decision at 14. The ALJ said that simply not divulging Ms. Heyward's name would have been sufficient. It is undisputed that the incident involved failure to serve a patron and that Ms. Heyward relayed racist actions to Mrs. Mitchell as noted above. Therefore, unless Ms. Helms made a habit of failing to serve African-American customers and making racist statements to African-American co-workers, Ms. Helms would have immediately known who made the complaint even if Ms. Heyward was not mentioned by name. The ALJ fails to see that this, yet again, and acts as if this affects their credibility.

The ALJ also makes two other severe missteps regarding the Mitchells' testimony. First, the ALJ falsely finds that Angie Mitchell was "inconsistent" on the issue of race being brought up. This is false in that Angie Mitchell stated on cross examination that she could not recall the extent to which race was brought into the meeting with Robin Helms, which again, does not affect the fact that everyone agrees she was told that. See (Tr. at 351:17-352:12). Ryan Henry, an independent testified about race being an issue. (Tr. at 381:5-16). The ALJ attacks this by saying it is inconsistent with Mr. Mitchell's testimony about race coming

up. This, however, very conveniently ignores the fact that everyone, including Robin Helms, agrees that Eugene Mitchell left the meeting before it was concluded. See, e.g., (Tr. at 274:1-13). The ALJ makes no attempt to explain why this was ignored.

The ALJ also attempts to insinuate that the treatment of Sarah Clark was somehow inconsistent in terms of discipline and that the Mitchells failed to follow their "protocol" by giving an opportunity to explain. See Decision 22. First and foremost, the Petitioner **did** give Robin Helms a chance to explain herself as Angie Mitchell testified that this was the purpose of the meeting in which Robin Helms was separated. (Tr. at 269:24-270:14; 274:1-13). The ALJ finds that the Mitchells did not give Ms. Helms an opportunity to explain as they did with Sarah Clark and this points to unspecified discriminatory motives. In doing so, the ALJ missed the true and far more logical conclusion that the Mitchells previously gave employees the opportunity to explain themselves suggests heavily that the Mitchells version of the April 30, 2015 meeting, in which they did just that, is actually the truth.

Sarah Clark was one of the individuals Ms. Helms claimed was also registering complaints about shift schedules. (Tr. at 57:5-25). However, the evidence showed that Sarah Clark left voluntarily after her graduation from Villanova University. (Tr. at 286:10-16). Mr. Mitchell testified that he Sarah Clark had a prior disciplinary issue regarding the service of a patron. Mr. Mitchell

testified that issue was addressed as Ms. Clark was reprimanded and Ms. Clark acknowledged the issue, was contrite, and said that the patron was intoxicated. (Tr. at 317:9-11; 323:10-25). If Petitioner was looking to get rid of people complaining about shift schedules, why would Petitioner not target the employee with a previous disciplinary issue[10]? This fact completely undermines the assertion that Ms. Helms was terminated as a result of her complaining about shift scheduling; the ALJ and the Board entirely failed to address this issue.

This entire issue regarding Sarah Clark illustrates, yet again, how much the ALJ had to twist the evidence to find for Robin Helms. It is also extremely noteworthy that Ms. Helms makes the assertion that she was fired for complaining about shift schedules and she specifically references going to management with fellow employee Kris Flood. Even assuming that Ms. Flood was making similar complaints and joining Robin Helms as she said she was, it still **does not** support Ms. Helms' case. It is important to note again here that General Counsel could have called Kris Flood to support this but did not.

Nonetheless, the undisputed evidence shows that not only does Ms. Flood still work for Petitioner, but that she has been promoted since Ms. Helms' termination. (Tr. at 261:10-15). If the complaints about shift scheduling were the

[10] Ms. Helms was previously disciplined for giving away free drinks in the Summer of 2014, but she was not dismissed. (Tr. at 258:13-259:21).

spark that caused retaliation against Ms. Helms, it absolutely does not make sense that Ms. Flood did not suffer the same fate, much less rising in the company hierarchy. As with everything else that supported Petitioner's case, the ALJ completely ignores this absolutely crucial evidence.

There is simply no way to twist the record to find "substantial evidence" to support the decision. The Board and the ALJ simply repeated the mistake made in MCPc, Inc. of failing to "take into account significant countervailing evidence in the record indicating that [employer] would have discharged [employee] regardless of his statements because it believed that he engaged in improper data access, dishonesty, or both." See MCPc, Inc., 813 F.3d at 493. Here, it is clear Robin Helms, even if she made protected statements, would have been discharged because it was reported to them that she engaged in blatantly racist behavior and had a negative attitude that was affecting other employees.

CONCLUSION

For all of the foregoing reasons, the National Labor Relations Board erred in affirming the decision of Administrative Law Judge Mark Carissimi based on improper findings of fact and application of law. Accordingly, Petitioner / CrossRespondent Mid-Atlantic Restaurant Group respectfully requests that this Honorable Court reverse the DATE Order of the NLRB finding that Mid-Atlantic violated Section 8(a)(l) of the National Labor Relations Act with regard to the discharge of Robin Helms.

CONWAY SCHADLER

By: /s/ Nathan J. Schadler

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The undersigned certify that he is a member in good standing of the Bar of this Court.

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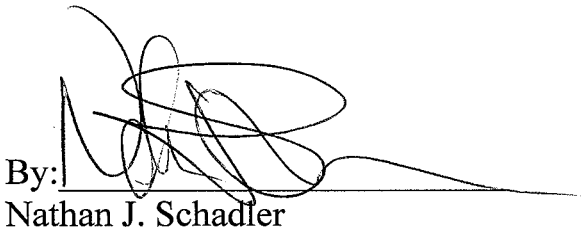

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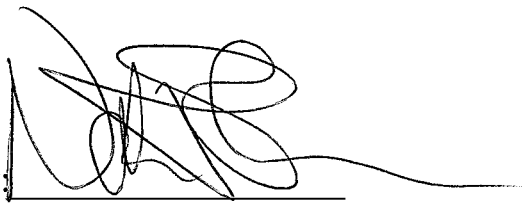

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Nathan J. Schadler

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By: _____
Nathan J. Schadler

CERTIFICATE OF SERVICE

I, Nathan J. Schadler, Esquire, hereby certify that on the date set forth below two copies of the foregoing Brief for Petitioner/Cross-Respondent and Joint Appendix were served via First Class United States mail, postage prepaid, and electronic filing upon the following:

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Nathan J. Schadler

Dated: August 21, 2017

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MID-ATLANTIC RESTAURANT GROUP LLC d/b/a KELLY'S TAP ROOM	:	
Petitioner,	:	
v.	:	No. 16-4300
NATIONAL LABOR RELATIONS BOARD,	:	
Respondent,	:	

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Petitioner, Mid-Atlantic Restaurant Group, LLC, d/b/a Kelly's Tap Room, hereby petitions this Honorable Court for review of the Order of the National Labor Relations Board entered on November 30, 2016, docketed at Case 04-CA-162385.

Dated: December 12, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2016, the foregoing Petition for Review of Order of the National Labor Relations Board was filed with the Office of the Clerk, United States Court of Appeals for the Third Circuit. A copy of the foregoing Petition for Review of an Order of the National Labor Relations Board was simultaneously served upon the following counsel of record via U.S. First Class Mail:

David Faye
National Labor Relations Board
Region 4
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david.faye@nlrb.gov

Dated: December 12, 2016

Respectfully Submitted,

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Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Taproom *and* Robin C. Helms. Case 04–CA–162385

November 30, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On June 13, 2016, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions, to amend the remedy,[4] and to adopt the recommended Order as modified and set forth in full below.[5]

ORDER

The National Labor Relations Board orders that the Respondent, Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Taproom, Bryn Mawr, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Robin Helms full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Robin Helms whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Robin Helms for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Robin Helms, and within 3 days thereafter, notify Helms in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for

[1] The General Counsel filed a motion to strike portions of the Respondent's supporting brief. In view of our disposition of this case, we find it unnecessary to pass on the General Counsel's motion.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by discharging employee Robin Helms, we agree that, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel met his initial burden and that the Respondent failed to meet its rebuttal burden because its proffered reasons for the discharge were pretextual. Regarding the General Counsel's initial burden, we agree that Helms engaged in concerted activity and additionally find that her activity was for the purpose of mutual aid or protection because, as the judge found, Helms sought to address the bartenders' ongoing scheduling problems and their concern over the loss of prime shifts to newly hired employees. Further, in finding that the General Counsel met his burden to establish animus towards Helms' protected activity, we do not rely on the judge's finding that the Respondent's handbook demonstrated hostility to employee complaints about working conditions.

In finding that Helms engaged in concerted activity for the purpose of mutual aid or protection, Member Miscimarra relies on the reasons stated in his dissenting opinion in *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014).

[4] In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we amend the remedy to provide that the Respondent shall compensate Robin Helms for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 9–16, Member Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

[5] We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Taproom *and* Robin C. Helms. Case 04–CA–162385

November 30, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

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[5] We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Bryn Mawr, Pennsylvania facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 30, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 30, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Robin Helms full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Robin Helms whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Robin Helms for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Robin Helms, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

MID-ATLANTIC RESTAURANT GROUP LLC
D/B/A KELLY'S TAPROOM

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-162385 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

David Faye, Esq., for the General Counsel.
Nathan Schadler, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on March 23–24, 2016. Robin C. Helms (Helms) filed the charge on October 21, 2015,[1] and the General Counsel issued the complaint on December 17, 2015.

The complaint alleges that the Respondent[2] discharged Helms on April 30, 2015, in violation of Section 8(a)(1) of the Act.[3]

On the entire record,[4] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company, operates a restaurant (Kelly's) in Bryn Mawr, Pennsylvania. Annually, the Respondent, in conducting its business operations described above, receives gross revenues in excess of $500,000 and purchases and receives at Kelly's, goods valued in excess of $5000 directly from points outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Credibility of Witnesses

In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also J. *Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007). In addition, I have carefully considered all the testimony in contradiction to my factual findings and have discredited such testimony.

The General Counsel's case rests in large part on the testimony of Helms. I found Helms to be a credible witness and rely on her testimony substantially with regard to factual findings. Throughout the trial her demeanor reflected a sincere desire to testify truthfully and her testimony had sufficient detail to render it reliable. Helms testimony reflected that she remembered in detail the events that she described. In addition, she testified consistently on both direct and cross-examination. In its brief, the Respondent contends that because Helms has a financial interest in the outcome of this proceeding and her testimony, for the most part, is not corroborated by the testimony of other witnesses, it should not be credited. The Board has long held, however, that the uncorroborated testimony of an alleged discriminatee can constitute substantial evidence in support of the allegations of the complaint when such testimony is found to be credible and is not undermined by contradictory evidence. *Ferguson Enterprises, Inc.*, 355 NLRB 1121 fn. 1 (2010); *Li'l General Stores Inc.*, 170 NLRB 867 fn. 1 (1968), enfd. in relevant part 422 F.2d 571 (1970).

I found the testimony of the Respondent's main witnesses, Eugene Mitchell and Angelia Mitchell to be generally unreliable and do not credit it to the extent that it conflicts with Helms' testimony. As will be set forth in further detail herein, their testimony is not mutually corroborative with respect to critical events and is generally implausible. The brief testimony of Respondent's witness Ryan Henry, contradicts the testimony of the Mitchells regarding the meeting at which Helms was discharged. In addition, as will be discussed further herein, Henry's recall with respect to much of his testimony was very limited and I found his testimony to be unreliable. I do not credit his testimony to the extent it conflicts with that of Helms. I will discuss the credibility of other Respondent witnesses as necessary later in the decision.

FACTS

Background

Eugene Mitchell is the majority owner of the Respondent which, as noted above, operates Kelly's restaurant. Kelly's is located in Bryn Mawr, Pennsylvania, near the Villanova University campus. Mitchell also has an ownership interest in two other restaurants, Flip and Bailey and Garrett Ale House, both

[1] All dates are in 2015 unless otherwise indicated.

[2] The Respondent will be referred to herein as the Respondent or Kelly's.

[3] The discharge of Helms is the only matter alleged to be an unfair labor practice in the complaint. The General Counsel did not make any amendments to the complaint at the trial alleging additional unfair labor practices. I indicated at the hearing that I would not consider anything to be an unfair labor practice unless it had been alleged as such in the complaint (Tr. 52–53).

[4] The record contains an affidavit executed by Eugene Mitchell (GC Exh. 7). While this document was identified on the record, it was not introduced into evidence at the hearing. Consequently, I have not read or considered GC Exh. 7 and I order that it be stricken from the record.

of which are located approximately a mile from Kelly's. Mitchell's wife, Angelia Mitchell, is the operations manager of Kelly's. During the time relevant to the complaint, there was also an on-site manager at Kelly's. Ryan Henry was the manager at Kelly's from approximately December 2014 until the fall of 2015. Prior to that time, Kristin Lang was the manager of Kelly's. The parties stipulated that Eugene Mitchell, Angelia Mitchell, Henry, and Lang were supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act.

Kelly's is a full-service restaurant which employs cooks, servers, full-time and part-time bartenders, and security personnel (bouncers). The restaurant has two levels and there is a bar on each level. During the time material to the complaint there were approximately 7 to 10 bartenders employed at Kelly's. The employees at Kelly's are not represented by a union.

Helms Raises Complaints about Employee Scheduling

Helms was hired by the Respondent as a part-time bartender in March 2014, and worked at Kelly's until she was discharged on April 30, 2015. Prior to the time that she was discharged Helms had perfect attendance record and the Respondent had never issued any written warnings or suspension to Helms.[5] Angelia Mitchell testified that Helms was a good bartender.

Helms testified that Thursday, Friday, and Saturday evenings, with a 5 p.m. start time were the most lucrative shifts for bartenders at Kelly's since the major part of a bartender's wages came in the form of tips and it was during those periods that there was the most volume of business. According to Helms, she would typically be notified by an email from the restaurant manager on Saturday regarding her schedule for the upcoming week beginning on Monday.

Helms testified that she and other employees at Kelly's had concerns about the manner in which they had some been scheduled for some period of time. In this connection, Helms testified that in October 2014, she met with Kristin Lang, along with another bartender Joe Fairley, and a server Chris Healy. According to Helms, Joe Fairley raised a complaint regarding the starting time for evening shifts. Fairley indicated that as a day-shift employee he should get all of the early start times for the evening shift and that anyone who did not work on the day shift should not get any early evening start times. Helms stated that she worked on Sundays, which was not a lucrative shift, equal to or less than a day shift, and therefore she was also entitled to some of the early evening start times. Healy indicated that he wanted to be on the bar staff as he had been at Kelly's for some time as a server. According to Helms, Kristin Lang indicated that complaining was not going to get the employees anywhere. She said that bringing in Eugene or Angelia Mitchell was not going to get the employees earlier evening starting times. Lang stated that Eugene Mitchell "would lose his shit" if the employees brought scheduling issues up to him.[6]

In late November or early December 2014 Helms told Lang that she was frustrated by Lang's mismanagement of the schedule. Lang told Helms that if she complained to the Mitchells about the schedule that Lang would get into trouble and that she could not handle that stress. Lang told Helms all that what happened is that she would be told to take shifts away from Helms.

In March 2015, Michael Bevevino, Kelly's most senior bartender, gave notice to the Respondent of his intention to leave in April 2015. In early April 2015, Angelia Mitchell began to interview new bartenders to hire because Bevevino was leaving and bartender Sarah Clark had indicated that she was also leaving her employment at Kelly's because she was graduating from college and was relocating from the area.[7] In mid-April 2015, Angelia Mitchell hired three new bartenders including Chelsea Heyward.

According to Helm's uncontradicted and credible testimony, she spoke to Flood and Clark about their frustrations with what they viewed as an inconsistency in scheduling and talked about the effect of the newly hired bartenders on their schedules and what they could do about it. Helms, Flood, and Clark were concerned that the new employees would be assigned the prime shifts starting at 5 p.m. on Thursday, Friday, and Saturday night. The three employees were concerned that this would affect their ability to get as many hours on the prime shifts as possible before the busy season at Kelly's ended after the first week of June.[8] (Tr. 57–59.)

In mid-April 2015, Helms and Flood met with Ryan Henry in the manager's office in the basement of Kelly's and brought to him the concerns regarding the schedule that Helms, Flood, and Clark had discussed previously. Helms and Flood specifically noted that with the changes in the schedule that were going to occur after Bevevino left, they wanted to make sure that senior bartenders, including the two of them, would receive the prime shifts that Bevevino worked starting at 5 p.m. on Thursday, Friday, and Saturday night. Henry indicated that he was sympathetic to their complaints but that there was nothing that he could do about it. Henry stated that bringing these complaints to the attention of the Mitchells would result in the loss of shift hours and a loss of shifts altogether.[9]

[5] Angelia Mitchell testified that in the summer of 2014, a "spotting" company reported that Helms had given away drinks for free. Mitchell testified this was contrary to the Respondent's policy and that she instructed Supervisor Kristin Lang speak to Helms about it. Mitchell testified that Lang reported Helms did not recall the incident occurring and that no further action was taken. Helms did not testify regarding this incident and I credit Angelia Mitchell's uncontradicted testimony on this point.

[6] Lang, Fairley, and Healy did not testify at the hearing. As discussed above, I found Helms to be a credible witness. Accordingly, I credit her uncontradicted testimony with respect to this meeting with Kristin Lang.

[7] Clark's last day of employment at Kelly's was approximately May 17.

[8] Helms testified that the restaurant was busy through the first week of June because of graduation parties and the Villanova alumni weekend in early June, but that after that business dropped off substantially for the remainder of the summer.

[9] I find that this meeting occurred in mid-April 2015 rather than late March 2015 as Helms testified to. Heyward, who was called as a witness by the Respondent, began working for the Respondent on approximately April 16. Heyward testified that on her first day of training she had to go to the basement at Kelly's and briefly observed Flood and Helms talking to Henry. Heyward testified that she overheard Helms and Flood tell Henry that they did not want their schedules affected by the new employees that had been hired. This portion of Heyward's

At the time of the hearing, Henry was no longer employed by the Respondent and testified on behalf of the Respondent pursuant to a subpoena. Henry testified in a vague and generalized fashion regarding this meeting. Henry initially testified he recalled that he met with Helms and Flood regarding their concerns about their schedules and shifts they would be assigned in light of Bevevino leaving. He then testified, however, that he recalled Helms and another person discussing scheduling with him but he did not remember whether it was Flood. Henry indicated that while he recalled Helms expressing concern over her schedule when Bevevino left, he could not recall whether the other bartender who was present expressed a similar concern. Henry did not specifically deny the threats attributed to him regarding the loss of shift hours or shifts altogether if complaints about the scheduling were brought to the attention of the Mitchells. I credit Helms testimony regarding this meeting as it had far greater detail. In addition, I found her demeanor while testifying regarding this issue to be convincing, while Henry's demeanor reflected uncertainty as to who he met with and what was discussed

Helms testified that in mid-April, she and Healy met with Henry in the bar area on the second floor of Kelly's. Healy stated that he had met one of the new bartenders. Healy told Henry that he wanted to make sure that as he had more seniority as a bartender, that he be given more bartending shifts before shifts were given to newly hired bartenders. Henry indicated that he could not guarantee anything. Helms told Henry that there was a general feeling of frustration among the more senior bartenders and a concern that the new hires would receive the prime shifts or be put on a shift that more senior bartenders had been regularly working, causing them to be removed from the schedule. Henry replied that he worked for the Mitchells and he did what they told him to as far as when Helms had been taken off the schedule in the past and a new employee put in her spot.[10] Helms told Henry that she had drafted an email to Eugene Mitchell that indicated that she had earned better shifts because of consistent work and great performance and picking up terrible shifts in the past. Helms showed Henry the email that she had drafted. Henry told Helms that the email would not get her anywhere, that it was just going to anger Eugene Mitchell and he cautioned her not to send the email.[11] Helms testified that she did not send the email to Eugene Mitchell.[12]

According to Helms uncontradicted and credited testimony, in addition to the two meetings, discussed above that she had with Henry and other employees to discuss employee concerns regarding scheduling, she spoke to Henry separately regarding the issue of scheduling approximately four more times from late March until the end of April 2015. In each of these conversations, Helms told Henry that the concern about scheduling was not hers alone, but that other bartenders were nervous and unsure of their positions and that it was causing "anxiety" among them. At one of her meetings with Henry, Helms told him that she wanted to speak to the Mitchells about the scheduling. Helms told Henry with the new employees coming in, she wanted to make sure that the senior employees were not going to lose prime shifts. Henry told her not to make any complaints to Eugene Mitchell about the schedule. Henry told her that a dishwasher who was also a cleaner recently have told Eugene Mitchell that he was not going to be available for several Saturdays and, as a result, Henry was told to take that employee office cleaning schedule in retaliation for requesting time off.

At the trial, Eugene Mitchell admitted that Henry told him that Helms was complaining about shift scheduling to other employees. (Tr. 159.) According to Mitchell, this occurred in the spring of 2015, when the new employees were being hired. Mitchell denied, however, of being aware of concerns that Helms raised to management about other employees' shifts.

Eugene Mitchell also testified that at an unspecified time Helms told Eugene Mitchell that she would like longer shifts and that he had let Henry know about this. I do not credit this portion of Eugene Mitchell's testimony. In the first instance, Helms testified that she never spoke to Eugene Mitchell directly regarding her dissatisfaction with the way that shifts were scheduled for employees. As I have noted previously, I found Helms to be a much more credible witness then Eugene Mitchell and to the extent their testimony conflicts, I credit Helms. I also find that it is implausible that Helms directly spoke to Eugene Mitchell about her dissatisfaction with the scheduling of shifts after she had been warned by both Lang and Henry that Eugene Mitchell would be upset if she directly approached him regarding such complaints.

Angelia Mitchell also admitted that she was aware of the concerns that Helms and Flood had regarding what shifts they would have in view of the hiring of the three new bartenders on April 9 and that both employees had expressed those concerns to Henry. (Tr. 176–177.) In this connection, Angelia Mitchell testified that she had received an email from Henry around the time that the new employees were hired reflecting that Helms and Flood were concerned about their shifts. (Tr. 260–261.) Mitchell also testified that each employee complained about

testimony partially corroborates Helms testimony regarding the substance of this meeting but establishes that it occurred in mid-April rather than late March.

[10] Helms testified that she had previously lost shifts without an explanation when new employees were hired.

[11] At the time the Respondent maintained an employee handbook which included "Disciplinary Guidelines," stating, in relevant part:

Management retains the right to discipline, including dismissal from employment, for any behavior, whether related to job performance or otherwise, which adversely affects the reputation or business activities of the restaurants:

1. Criticizing, condemning, or complaining in a manner that affects employee morale. (GC Exh. 3, p.18.)

[12] Henry testified generally that he recalled that Helms raised, on at least one occurrence, concerns about the scheduling and that she wanted a particular schedule. Henry testified that he did not recall if Helms raised concerns about the schedules of other employees beyond her own. Henry testified that he had communicated with the Mitchells through email and that his interactions with them in that regard were "professional." Henry was not asked about, and therefore did not specifically deny, making the statements attributed to him by Helms regarding what he thought Eugene Mitchell's reaction would be to the email that Helms showed him. I credit Helms version of this meeting over that of Henry. Helms' testimony regarding these meetings with Henry has the type of detail that renders it reliable and her demeanor while testifying regarding this event reflected certainty.

their individual schedule and sought improvement of their own schedule.

The Bartenders' Practice at Kelly's Regarding Service

Helms testified that the service policy at Kelly's was that bartenders were not to serve anyone that was intoxicated or did not have identification. Helms also testified that there was an established practice that customers that were known not to tip, or not to tip well, were served after other customers. According to Helms credited testimony, this policy was enforced by Michael Bevevino, the most senior bartender, and the employee who would divide the tip money among the bartenders at the end of the evening.[13] Bevevino would tell other bartenders that because a customer did not tip, he or she would be served after others were served. Helms testified that when she was working in Bevevino's area and he saw her serve people that he had indicated should be served last, he would "yell" at her for serving those customers quickly. According to Helms, there were three Villanova students who were regular customers and known not to tip. Two were males and one was an African-Americans female, who was known to be in a sorority.[14] Helms testified that while she was sympathetic to the customers that did not tip because, for the most part they were college students who did not have a lot of money, she would comply with the practice enforced by Bevevino when he was present and serve customers known not to tip after other customers. Helms credibly testified, however, that she never refused to serve any customer unless they were intoxicated.

Helms testified that after the Super Bowl party held at Kelly's in February 2016 she had a conversation with Eugene Mitchell in which the practice regarding service to customers who do not tip, or did not tip well, came up. Mitchell asked Helms about how a couple, who were personal friends of the Mitchells and who had been at the Super Bowl party, were as guests. Helms replied that they were "nice" and that she did not have a problem the way that they tipped, but that Bevevino did not engage them and told the other bartenders to get their drinks before they left the bar area so that he would not have to do so. Helms told Mitchell that Bevevino did not interact with the couple because he felt he did not tip an appropriate amount.[15]

On February 15, 2015, at 1:56 a.m., a customer of Kelly's sent an email to Eugene Mitchell regarding service he received at Kelly's on the evening of February 14-15. (GC Exh. 4.) The customers email indicated that at approximately 1:15 a.m. on February 15, a female bartender told him that he would not be served. She told him "You don't tip well enough, I work for tips, fuck you." The customer's email further indicated that "I was very upset because of the 4 drinks I previously purchased, I had tipped twice. I don't have money to tip every time, but tip every other to make sure bartenders get their pay. As I walked to another bartender, I saw the blonde woman point me specifically, and tell the other 2 bartenders not to serve me." The customer indicated that he was concerned that he will be treated that way future visits to Kelly's which would force him to take his business elsewhere.

On February 15, at 7:41 a.m., Mitchell responded to the customer thanking him for his letter and apologizing for his experience. The email further indicated: "There are many instances with patrons who did not tip. I will tell you that regardless of the tip the bartenders are trained and instructed to treat each patron with dignity and respect. This issue noted in your email will not be lightly taken and will be addressed today."

On February 15, at 7:50 a.m., Mitchell forwarded the customer's email to the bartenders at Kelly's, and stated in his own email: "You can certainly choose to serve at your discretion but we can't have interactions like the one described below. It will do more damage than good and generally reverberate through the community. There are some really good days ahead of us with the basketball team doing well and spring around the corner . . . I think. I know these kids can be unbearable, frustrating and rude to say the least. Be patient and please do not lash out. Take a break if you need to decompress."

Later in the morning of February 15, Sarah Clark sent an email to Eugene Mitchell stating in part, "I have a much different version of the story, and I know ultimately it does not matter, but I am still sorry. I just wanted to let you know that the content in his email is not how it actually went down." Clark indicated that she would be happy to tell Mitchell her side of the story.

On the afternoon of February 15, Mitchell sent an email to Clark indicating: "Thank you for responding. I am totally on your side and everyone that works with us. The intent on sending the email was not to call you out just to let everyone know how things reverberate on the smallest of issues. You are all good with us. I would like to hear your side and that he was belligerent or cut off would be great to document. We always get hammered for VIP and never point out when folks are cut off. Anyway, don't let this impact your day, at all. Let's make some money when we have the chance. You guys deserve it."

According to Mitchell's uncontradicted and credited testimony, he later met with Clark and told her that her behavior toward the customer was inappropriate, but that no further action was taken against her. Mitchell admitted that it is quite common in the restaurant industry that some bartenders will give better service to customers who tip better. Nonetheless, Mitchell also testified that he was not aware of Bevevino's practice while employed at Kelly's of not quickly serving customers who did not tip or, in his view, did not tip appropriately. I do not credit Mitchell's testimony on this issue because, as noted above, I find that Helms specifically advised him of it. I also find that Mitchell's testimony on this issue is implausible, given his admission that he is aware that such a practice is common in the restaurant industry. In addition, the email exchange set forth above establishes that a customer complaint regarding a lack of service because of a failure to tip was specifically brought to Mitchell's attention. Mitchell acknowledges

[13] All tips were pooled and were divided equally between all bartenders on duty on a particular evening by Bevevino.

[14] Although Bevevino was called as a witness by the Respondent, he did not testify regarding the policy of the bartenders at Kelly's regarding the relationship between tipping and service. Thus, Helms testimony on this point is uncontradicted.

[15] Eugene Mitchell testified that he did not recall having such a conversation with Helms. I credit Helms testimony regarding the conversation as it had sufficient detail to establish its reliability and her demeanor while testifying regarding this incident was convincing.

speaking to Clark about the matter and telling her that such conduct was inappropriate. The record establishes, however, that no discipline was ever administered to a bartender at Kelly's because of a failure to serve a customer, or serve a customer promptly, because the customer did not tip, or did not tip appropriately.

Helms' Training with Heyward

Helms testified that she was assigned to train newly hired bartender Heyward on the second night of Heyward's training at Kelly's. According to Helms, she told Heyward that since Kelly's was a high-volume, quick turnover bar, typically the bartenders would first serve the customers who they knew tipped, and later serve the customers the bartenders knew did not tip. Heyward responded and that she had worked in this type of environment before and that that was the universal rule regarding service.

According to Helms, Heyward told Helms that Sarah Clark, who had trained Heyward on her first evening of work at Kelly's, told Heyward that shifts were not assigned well and that there were complaints from the staff regarding scheduling. Heyward added that as a single mother she needed a consistent schedule in order to support her son. Heyward asked Helms her opinion about whether she should stay at Kelly's, since Helms was also a mother. Helms replied that she agreed with Clark that shifts and scheduling were an issue but that she did give an opinion about what Heyward should do.

On cross-examination, Helms testified that while Helms was working with Heyward, the African-American woman who was in a sorority, came into the restaurant and Helms mentioned to Heyward that she was known not to tip and was served after others. Helms denied refusing to serve the customer. Heyward served the customer. Helms noted that on the same evening, Helms served several African-American bouncers who worked at the restaurant, who were with their wives and girlfriends celebrating a birthday.

At the time of the trial, Heyward, who is African-American, no longer worked at Kelly's and testified on behalf of the Respondent pursuant to a subpoena. According to Heyward, when they trained together, Helms told her that if newly hired employees were scheduled for earlier shifts that started at 5 p.m., Helms would be upset because she had seniority. According to Heyward, Helms complained generally about Kelly's and also told Heyward that if she was really unhappy there, Heyward should look for something else in terms of employment. Heyward responded that if it was that bad at Kelly's, she would learn that very quickly and keep moving as she had a son to care for.

Heyward testified that while she was training with Helms, two young African-American women came into Kelly's celebrating the fact that they were finishing school. Helms told Heyward that she was not going to serve them because they never tipped her. According to Heyward, Helms said that if he she wanted to wait on them she could do so but that Helms was not going to do it. According to Heyward, she waited on the two African-American women, who were there with other people. After the African-American customers had paid, Helms said to her "Let me guess, they did not tip you." Heyward responded that they did and they actually tipped well. Heyward responded that it must be because she was black also. Heyward responded that she was offended by Helms comment. Heyward also confirmed, however, that some of the African-American bouncers who worked at Kelly's came in to celebrate a birthday that evening and that Helms served them and was very nice to them.

I generally found that Heyward was not a credible witness. Her testimony was often disjointed and not cohesive. She at times indicated that her testimony was "my interpretation" of events. As noted above, I found Helms to generally be credible and I credit her testimony over that of Heyward regarding the description of events that occurred when Heyward trained with Helms prior to their discussion of the tip left by the two African-American American female customers. I also found parts of Heyward's testimony to be implausible. For example, Heyward testified that Helms told her that if she was really unhappy at Kelly's, Heyward should look for other employment. There is nothing in Heyward's testimony, however, to indicate that she had ever told Helms that she was unhappy at Kelly's. Under these circumstances, I find it implausible Helms would tell Heyward that if she was unhappy at Kelly's she should look for other employment.

However, I partially credit Heyward's testimony with respect to the discussion between Helms and Heyward regarding serving the African-American female customer, who was known not to tip. After carefully considering the testimony of both Helms and Heyward, I find that Helms pointed out the African-American female customer referred to earlier and told Heyward that she was known not to tip the bartenders. Heyward served that customer and another African- American female customer who was with her. I specifically find, based upon Helms consistent testimony on this point and the record as a whole, that Helms never refused to serve the African-American female customer, but merely indicated that the customer was known not to tip. However, after Heyward served the two African-American female customers, I find that Helms asked Heyward, "Let me guess, I bet they did not tip you" and when Heyward told her that she had been tipped well, Helms responded that it must be because Heyward is also black. While Heyward was not a particularly reliable witness, I do not believe that she would not invent those specific details. In addition, Helms was not questioned about what, if any, comments she made about the tip left by the African-American female customers and therefore did not specifically deny those statements.

On approximately April 28, Hayward spoke to Angelia Mitchell and told her that she had another job and was leaving. When Mitchell asked Heyward her reasons for leaving, Heyward responded by saying generally that she did not think she was treated well by Flood and Helms. Heyward also indicated that she felt "negative energy" from Helms because she did not have anything positive to say about Kelly's. Heyward also told Mitchell about the comments described above that Helms had made to her when she received a tip from the two female African-American customers. Heyward also asked Mitchell not to

tell Helms what she had said about her. Heyward continued working for Kelly's for approximately 2 weeks after giving her notice.[16]

Helms' Discharge

Helms testified that on April 30, 2015,[17] when she reported to work to start her shift at 5 p.m., Henry asked her to come downstairs to his office. When they arrived at the office, Angelia Mitchell was also present. Shortly thereafter, Eugene Mitchell also arrived. Eugene Mitchell had a paper in his hand and said that he had listened to hours of tape and he had heard what she had said about "us" and had documented it. Eugene Mitchell told Helms that she had hurt their feelings and that they would not take that and that she was fired. Eugene Mitchell then left the office.

Angelia Mitchell then told Helms that she was not sure if Helms knew but that when the security camera system was updated at Kelly's, listening devices were also installed and that they had recorded Helms complaints and that it had hurt their feelings. Angelia Mitchell then turned to Henry and said that she did not think that anyone knew that listening devices had been installed and Henry merely shrugged his shoulders. Angelia Mitchell then said that Eugene Mitchell wanted to "clean house" and fire the entire staff because everybody was making the complaints. Angelia Mitchell further stated that Eugene Mitchell wanted to close for the weekend and start fresh on Monday with a new staff, and that she had to talk him out of it.

According to Helms, Angelia Mitchell then stated that they had expected friends to come in that night and that she would be mortified if their friends overheard the employees talking about their complaints regarding working conditions. Mitchell stated although it is clear from the tapes that the complaints discussed between Helms and her coworkers had not been overheard by customers, she was concerned that they would be heard that night by her friends.

Helms stated that while she did complain to coworkers about working conditions she had never talked to any of the guests about it and that Mitchell would not hear anything like that of the tapes because it never happened. Helms stated that she did not understand why she was being fired because she consistently showed up for work despite having two small children. Helms also noted that that she always treated customers courteously and had repeat regular customers and brought in a good amount of money. Helms stated that she was very good at her job, so why was this happening based on the valid complaints she had raised. Angelia Mitchell replied that none of that mattered to them. Angelia Mitchell stated that they were a small family business and the fact that Helms hurt their feelings meant more than actual job performance.

Helms then turned to Henry and said that her complaints about the scheduling had never been specifically addressed. Helms told Mitchell and Henry that the Respondent did not have an open door policy and when she made her complaints, she was told that they were not going to be treated in the way that she wanted them to be and that she should keep them to herself. Helms told Mitchell and the Henry that she had done a good job and worked hard and that she deserved the shifts that were not being given to her. Helms stated that there was a constant "walking on eggshells" type of atmosphere at work. Helms stated that it was frustrating not knowing whether a scheduled shift would be assigned to a newly hired employee after she had made child care arrangements. Henry admitted that Helms had complained to him about shift scheduling and that he told her that her complaints were not going to be answered in the way she wanted. At that point the meeting ended and Helms went to get her personal belongings.[18] While she was gathering her belongings, Flood approached her and Helms told her that she had been fired and that Angelia Mitchell had told her that the Respondent had recorded employees and heard them complaining and that it was very likely that Flood was on the tapes also.

Angelia Mitchell testified that after Heyward told her she was leaving Kelly's and spoke to her about Helms, Mitchell " I set up a plan to I was going to have to get her (Helms) to admit that she did not serve a black person and to get it out of her what happened without disclosing Chelsea." (Tr. 269.)[19] Mitchell testified that she came up with a ruse that the Respondent had listening devices at Kelly's and then Helms could not deny what happened. Angelia Mitchell testified she told Eugene Mitchell about the alleged "racist comment" made by Helms and what should be done.[20] Angelia Mitchell denied discussing with Eugene Mitchell Helms' complaints about scheduling in this conversation.

Angelia Mitchell testified that at the meeting held with Helms Eugene Mitchell asked Helms if she was unhappy and what was going on. She testified that Eugene Mitchell asked Helms if the "kids" and the late night "getting to you." Angelia Mitchell also testified that she and Eugene Mitchell told Helms that she had been "complaining to everyone except the two of them about the work environment, the late-night college students and her job." (Tr. 178.) According to Angelia Mitchell, Helms said she was miserable. Angelia Mitchell testified she then asked Helms if she denied service to a customer she felt would not tip. Mitchell testified that when Helms denied it, Mitchell then told Helms that she had her on tape and asked Helms again if she denied service to someone. Mitchell testified that she could not remember if she told Helms the custom-

[16] I based these findings on the testimony of Heyward. I do not credit Angelia's Mitchell's testimony regarding the conversation between her and Heyward. Mitchell's testimony is not corroborated by Heyward in important respects and appears designed to buttress the Respondent's defense. I specifically discredit Mitchell's testimony that Heyward told her that Helms refused to serve the customer because she was black and that Helms was a racist.

[17] I take administrative notice of the fact that April 30, 2015, was a Thursday.

[18] Helms consistently denied on cross-examination that her alleged refusal to serve an African-American customer was brought up in this meeting.

[19] As noted above, I specifically discredit the portion of Angelia Mitchell's testimony in which she indicated that Heyward reported to her that Helms refused to serve a black customer and that Helms was a racist.

[20] Angelia Mitchell's testimony does not indicate what she discussed with Eugene Mitchell regarding what they should do with Helms prior to the meeting on April 30.

er was a black person. (Tr. 272.) Mitchell testified that Helms finally admitted that she had not served somebody because they did not tip. According to Mitchell's direct testimony, she told Helms, "I have a lot of people that come in here that are black. And this lady happened to be black, and you said it to a black coworker." According to Mitchell, she then asked Helms what if it had been an African-American female that she coordinates functions with at the Villanova University. (Tr. 272.)[21] According to Angelia Mitchell, Eugene Mitchell then said that "I cannot have this, you're unhappy, we're unhappy, we cannot run a business like this. You should not be working here if you're this unhappy." According to Mitchell, Helms said, "Okay" and then Eugene Mitchell left the meeting. Mitchell testified that she and her husband did not anticipate that it would end this way and that it felt like a "mutual separation." At this point, Mitchell testified she did not consider Helms an employee any longer. According to Angelia Mitchell, she then asked Helms what was going on and Helms said that she was miserable and felt like she was "walking on an eggshell every day." Mitchell further testified that Helms said she was upset about all the new hires and did not like not knowing when she was going to be scheduled.

Eugene Mitchell testified in a generalized fashion that before he met with Helms on April 30, he had received complaints from her coworkers that she was difficult to work with and that employees did not want to work at the upstairs bar with her because she was not pleasant to be around. Eugene Mitchell also testified that he was aware that Helms raised concerns about shifts to Henry but testified that they were about her own shifts and not about other employees. Eugene Mitchell further testified to a conversation with Angelia Mitchell regarding information that she had received from Heyward regarding an African-American patron and the conversation between Heyward and Helms regarding service to that customer. Mitchell testified that he could not remember the specific statements that were relayed to him by Angelia Mitchell but that it was "definitely minority discrimination" in his mind and that they needed to address the issue with Helms. According to Mitchell, his intention was to address with Helms the specific issue that had arisen regarding service to the African-Americans patron and to also address with Helms the complaints from her coworkers that they did not want to work with her anymore.

Eugene Mitchell testified that when he arrived at Kelly's on April 30, Angelia Mitchell, Henry, and Helms were present. When he arrived, Mitchell said to Helms that he had received complaints from her coworkers about not wanting to work with her and that she was not serving customers because she did not think that she was going to be tipped. Mitchell testified that he told Helms that there was a surveillance camera and that he and his wife had heard Helms refusing service when he and his wife listened to the audio.[22] Mitchell testified that he did not bring up Heyward's name because of her request not to do so. According to Mitchell, he asked Helms what was going on. He told Helms that it seemed like she was "burned out," and that she may be exhausted. He said that he had been doing this for 10 and 12 years and that the "kids" could wear you down and it was late the school year and it gets difficult. According to Mitchell, Helms said "You're right. I should have left a couple weeks ago. I can't take it anymore." According to Mitchell he said "Okay, I guess were done here." Mitchell testified that he assumed that the conversation was over and that "we agreed that there was no need for her to work there any longer." Mitchell then left the meeting, while Angelia Mitchell and Henry remained with Helms. Mitchell admitted that he did not bring up the issue of Helms allegedly not serving an African-American customer at the meeting. (Tr. 292–293.)

Henry testified that on April 30 he was present in his office for the meeting between the Mitchells and Helms. On direct examination, Henry testified that there were some questions about Helms' behavior and at one point there was discussion about "discriminatory acts regarding race." Henry then testified "At that point when she was asked about that specific piece about race, she had agreed that she had, how do I put it, done that act, I guess." Henry testified that Helms that the reason for Helms being discharged "was directly tied to the discriminatory act." (Tr. 381.) On cross-examination Henry testified he did not recall anything more specific about the "discriminatory incident," but that he did recall that her termination involved a discriminatory act based on race Henry did recall, however, Eugene Mitchell telling Helms that she was fired. Henry did not recall Helms raising at the meeting that shifts were not scheduled correctly and that employees were walking on eggshells and he did not recall Eugene Mitchell leaving the meeting early.

I credit Helms testimony regarding what occurred on the meeting of April 30 to the extent it conflicts with that of the Respondent's witnesses. Helms testimony was detailed and consistent on both direct and cross-examination and was inherently plausible. Helms demeanor while testifying reflected a sincere desire to tell the truth.

The testimony of the Respondent's witnesses is not mutually corroborative and is replete with other impairments that establish it as unreliable. In the first instance, both Mitchells admitted that they lied to Helms about having audio recording devices at Kelly's during her termination meeting. The fact that the Mitchells created an elaborate fiction regarding the installation of listening devices at the restaurant is indicative of their untrustworthiness as witnesses. I do not accept that the Mitchells wanted to keep Heyward's name out of the discharge meeting as a reasonable explanation for this falsehood. Simply not divulging Heyward's name was would suffice if that was truly a concern of the Mitchells. Eugene Mitchell admitted, however, that he never even brought up the issue of Helms allegedly not serving an African Americans customer while he was in the meeting. Based on inferences drawn from the record as a whole, I find that the Mitchells concocted a false statement

[21] On cross-examination, however, Angelia Mitchell testified that she did not say anything to Helms about the customer being an African-American, a coworker being an African-American, or an African-American customer who the Mitchells did business with. (Tr. 351–352.)

[22] Mitchell testified that he lied about the presence of an audio recording in order to protect the identity of Heyward.

regarding surreptitious taping equipment at Kelly's in order to have Helms believe that her protected statements to other employees at work regarding working conditions were secretly recorded.

I find Angelia Mitchell's testimony to be internally inconsistent. Angelia Mitchell initially testified on direct exam that she could not remember if she told Helms that the customer that Helms allegedly did not serve because the customer did not tip was black. Later in her direct testimony, Mitchell testified that she told Helms that the customer was black and that Helms told a black coworker that she would not serve the customer. Mitchell then added that she asked Helms what if the black customer had been the black woman that Mitchell worked with in coordinating parties for Villanova University. On cross examination, however, Mitchell completely reversed course and testified that she did not say anything to Helms about the customer being black, a coworker being black, or a black customer the Mitchells did business with. Testimony of this type containing such a fundamental internal inconsistency is not a reliable basis on which to make factual findings.

Henry's testimony was devoid of any details and conflicted in a substantial way with the testimony of the Mitchells. As noted above, Henry testified that Helms was discharged by Eugene Mitchell for a discriminatory act based on race. The Mitchells referred to the meeting with Helms as resulting in a "mutual separation" while Henry testified that Helms was discharged by Eugene Mitchell. Henry's testimony also conflicts with that of Eugene Mitchell on whether or not the issue of race came up in the meeting.

I find that the conflicting version of events from the Respondent's witnesses too unreliable on which to base factual findings. In addition, based on the record as a whole, I find it implausible that after weeks of trying to obtain what she believed to be an appropriate schedule based on her seniority, that Helms was suddenly state that she agreed with Eugene Mitchell that she was "burned out," and that she should have left weeks and ago and could not take it anymore.

On the basis of the foregoing, I find, based on Helms' credible testimony and admissions made by the Mitchells that at the meeting held on April 30, 2015, Helms was informed by Eugene Mitchell he had listened to recordings regarding what Helms had said about the Mitchells. Both he and Angelia Mitchell told Helms that she had been complaining to everyone "except the two of them" about the work environment and her job. Eugene Mitchell said that it had hurt their feelings and they were not going to take it and she was fired.[23]

After Eugene Mitchell left the office, Angelia Mitchell then indicated that when the security system was updated, audio listening devices were also installed and had recorded Helms complaints and that it had hurt their feelings. Mitchell then told Helms that they were aware that the entire staff was complaining about working conditions and that Eugene Mitchell wanted to "clean house" and fire everyone because of it, but she had talked him out of it. Angelia Mitchell then said that they had expected friends to come in that night and would be mortified if their friends overheard the employees talking about their complaints regarding working conditions. Helms stated that while she did complain to coworkers about working conditions, she had never talked to any of the customers about it.

Helms stated she did not understand why she was being fired because she always showed up for work, and was very good at her job. Helms asked why this was happening to her based on making valid complaints. Angelia Mitchell replied that none of that mattered to them and that they were a small family business and the fact that Helms hurt their feelings meant more than actual job performance.

Helms then stated that she had made complaints about the scheduling of shifts and was told that they were not going to be treated in the way that she want them to be and that she should keep them to herself. Helms also reiterated her frustration regarding the scheduling of shifts, such as not knowing when you would work and having a scheduled shift allotted to a newly hired employee. Henry admitted that Helms had complained to him about scheduling and that he told her that her complaints were not going to be answered in the way that she wanted.

I also find that there was no mention made by either of the Mitchells at this meeting of Helms alleged refusal to serve an African-American customer before the meeting ended. This finding is supported by Eugene Mitchell's admission that he did not bring up the subject at the meeting and Helms' credible testimony. I discredit the testimony of Angelia Mitchell that the subject was raised based upon the substantial conflict between her testimony on direct examination and her testimony on cross-examination regarding this point. I also discredit the testimony of Henry that Helms was discharged because of a discriminatory act based on race because of the complete lack of detail in his testimony and the fact that it is not corroborated by any other credible evidence. I also rely on the fact that his demeanor while testifying reflected substantial uncertainty.

The Contentions of the Parties

The General Counsel contends that the Respondent discharged Helms on April 30, 2015, because she and other employees complained about shift schedules in violation of Section 8(a) and (1) of the Act. The General Counsel argues that that pursuant to the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. den. 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), a prima facie case has been established that the motivation for Helms' discharge was her protected concerted activity and the Respondent has not rebutted the prima facie case by establishing that it would have taken the same action against Helms in the absence of those activities.

The Respondent principal argument is that any complaints that Helms raised involved only her own "position and interests" and did not constitute protected concerted activity under the Act and that consequently her discharge was lawful. In support of its position the Respondent relies principally on *MCPc, Inc. v. NLRB*, 813 F.3d 475 (2016), vacating and remanding 360 NLRB No. 39 (2014).

The Respondent also contends that assuming that Helms engaged in protected concerted activity, the General Counsel has not established a prima facie case that such activity was a motivating factor for Helms' discharge under the test set forth in

[23] The record contains no documents reflecting the reasons for Helms' discharge.

Wright Line, supra. In this connection, the Respondent contends that many employees have contacted Angelia Mitchell regarding scheduling issues without being subject to retaliation. Finally, the Respondent contends that even if the General Counsel has established a prima facie case under *Wright Line*, it presented evidence that it would have taken the same action toward Helms in the absence of such activity. The Respondent contends that it lawfully discharged Helms because she made "racist statements and refused to serve African-American customers" and that she displayed a "negative attitude" that adversely affected other employees. (R. br., pp. 28–29.)

Analysis

In order to be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (2014).

In *Meyers Industries*, 268 NLRB 493, 497 (1984) *(Meyers I)*, remanded sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988), the Board explained held that "to find an employee's activity to be 'concerted' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Following the remand from the United States Court of Appeals for the District of Columbia Circuit, in *Meyers Industries*, 281 NLRB 882, 887 (1986) *(Meyers II)*, enfd. sub nom. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), the Board reaffirmed the standard regarding concerted activity that it set forth in *Meyers I* but clarified that it "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."

It is also clearly established that concerted activity is not dependent on a shared objective by the employees involved, or on the agreement of one's coworkers with what is proposed. In addition, an employee may act partly from self-interested motivation and still be engaged in concerted activity. *Fresh & Easy Neighborhood Market*, supra, slip op. at 4, and cases cited therein. In *Worldmark by Wyndham*, 356 NLRB 765, 766 (2011), the Board held that any doubt about whether an employee's discussion of employment conditions with an employer is concerted is removed when other employees join in that discussion At that point, the employee's actions become "incontrovertibly concerted" under *Meyers* because at that point the actions are undertaken "with . . . other employees." (268 NLRB at 497.)

In *Fresh & Easy Neighborhood Market*, supra, slip op. at 3, the Board noted that "The concept of 'mutual aid or protection," focuses on the *goal* (emphasis in the original) of concerted activity; chiefly whether the employee or employees involved seek to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB* 437 U.S. 556, 565 (1978). In *Fresh & Easy Neighborhood Market*, the Board noted that it had found a broad range of employee activities regarding terms and conditions of employment to fall in the scope of mutual aid or protection. In this regard, the Board noted that it "has found that an employee who asked for help from coworkers in addressing an issue with management, does, indeed, act for the purpose of mutual aid or protection, even where the issue appears to concern only the soliciting employee, the soliciting employee would receive the most immediate benefit from a favorable resolution of the issue, and the soliciting employee does not make explicit the employees' mutuality of interests." Id. slip. op. at 5 and cases cited therein.

In *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied in relevant part on other grounds, 81 F.3d 209 (D.C. Cir. 1996), the Board held that the discussions and complaints of four employees regarding schedule changes constituted protected concerted activity and their discharge for engaging in such conduct violated Section 8(a)(1) of the Act.[24] In finding the employees discussions and complaints to be protected concerted activity, the Board noted that changes in work schedules are directly linked to hours and conditions of work - vital conditions of employment- and employee discussion of such issues were likely to lead to collective action.

Applying these principles to the instant case, it is clear that Helms was engaged in protected concerted activity when she discussed the schedule and shift changes with other employees and with the Respondent's acknowledged supervisors.

In mid-April 2015, Bevevino's announced departure and the hiring of new bartenders spurred additional concerns about scheduling among the existing bartenders. In this connection, Helms, Flood, and Clark discussed what they viewed as inconsistent scheduling and what they could do about it. The three employees specifically discussed concerns that the new employees would be assigned the prime shifts starting at 5 p.m. on Thursday, Friday, and Saturday. The three employees discussed the effect this would have on their ability to obtain as many hours as possible on the prime shifts before the busy season at Kelly's ended after the first week of June.

In mid-April 2015, Helms and Flood met with Henry in the manager's office at the basement of Kelly's and jointly presented their concerns about the scheduling of shifts. Both employees specifically noted that with the changes in the schedule that were going to occur after Bevevino left, they wanted to make sure that senior bartenders, including the two of them would receive the prime shifts starting at 5 p.m. on Thursday, Friday, and Saturday night. Also in April 2015, Helms and Healy met with Henry in the bar area on the second floor of Kelly's and again raised issues regarding the schedule. Healy told Henry that since he had more seniority as a bartender, he wanted to be given more bartending shifts before they were given to the newly hired bartenders. Helms noted a general feeling of frustration among the more senior bartenders and the concern that the new hires would receive the prime shifts, or be put on the shift that more senior bartenders had been working, causing them to be removed from the schedule.

In addition to the meetings that she had with other employ-

[24] In denying enforcement of this portion of the Board's order the court found that, assuming arguendo, the employees were engaged in a form of concerted activity, their conduct was not protected under the Act because it occurred in in the presence of patients. 81 F.3d at 214.

ees and Henry, Helms had approximately four other discussions with Henry about the scheduling of bartenders. In each of these conversations, she told Henry that concerns about scheduling was not hers alone but that other bartenders were unsure of their positions and it was causing anxiety among them.

It is clear that Helms discussions with Flood and Clark regarding scheduling is concerted protected activity pursuant to the Board's decision in *Aroostook*, supra. The meetings that Helms had with Lang and Henry at which other employees were present and concerns were raised by the employees regarding the scheduling of shifts constituted "incontrovertibly concerted" activity pursuant to the principles expressed in *Meyers I* and *Worldmark by Wyndham*.

The fact that at the meetings that Helms, Fairley, and Healy held with Lang in October 20, 2014, and the meeting that Helms and Healy had with Ryan in mid-April 2015 the employees raised individual issues regarding scheduling does not detract from the fact that, on a collective basis, they were raising concerns about working condition and thus were engaged in protected concerted activity. *Fresh & Easy Neighborhood Market*, supra slip op. at 4.

I do not agree with the Respondent's position that the decision of the United States Court of Appeals for the Third Circuit in in *MCPc, Inc.*, supra, requires a finding that Helms was not engaged in protected concerted activity. In *MPCc, Inc.*, 360 NLRB No. 39 (2014), the Board found that the respondent violated Section 8(a)(1) of the Act by discharging an employee for engaging in protected concerted activity. In that case during a group meeting conducted by a respondent supervisor, the participants discussed the employees' heavy workload and one employee, Galanter, urged the respondent to hire additional engineers to alleviate the work load. In support of this point, the Galanter mentioned that the respondent had hired a corporate executive at a $400,000 salary that could have been used to hire additional engineers. Two other employees present at the meeting expressed agreement with Galanter. The Board found that Galanter engaged in protected concerted activity when discussing with other employees terms a condition of employment, pursuant to the principles set forth in *Meyers II* and *Worldmark of* Wyndham. In doing so, the Board noted that it had consistently found activity concerted when a single employee protests changes to employment terms common to all employees in front of the coworkers. The Board also noted that the discussion about employee workload's occurred at a meeting involving team building and that two other employees participated in the discussion by expressing agreement with the latter's comments. Id.at slip op. 1.

In its decision, the Third Circuit, after considering its own relevant precedent, including *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), and that of the Board, concluded, in agreement with the Board, that Galanter had engaged in concerted protected activity. (813 F.3d 482–487.) However, the court vacated the Board's decision and remanded it to the Board for further consideration of the Respondent's defenses under *Wright Line*.

I am, of course, obligated to apply Board precedent in deciding the allegations of the complaint, *Pathmark Stores, Inc.* 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.* 273 NLRB 746, 749 fn. 14 (1984). Thus, I must apply the rationale of the Board's decision in MPCc in resolving the issues presented by the instant case. Since in its decision In *MPCc*, the Third Circuit agreed with the Board's analysis of whether Galanter engaged in protected concerted activity, I do not find that the court's decision in any way supports the Respondent's contention in the instant case that Helms did not engage in concerted protected activity. Accordingly, on the basis of all of the foregoing, I find that Helms was engaged in protected concerted activity when she presented employee concerns to the Respondent's supervisors regarding the scheduling of bartenders' shifts.

The Board applies the analysis of *Wright Line*, supra, to 8(a)(1) allegations that turn on motive. *Ferguson Enterprises*, supra, at 1121 fn. 3; *State Plaza Hotel*, 347 NLRB 755 (2006). In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity, and antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. Accord: *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011).

In the instant case, as discussed in detail above, Helms clearly engaged in protected concerted activity when she raised complaints about scheduling with, and on behalf of, other employees to admitted Supervisors Lang and Henry.

With regard to whether the Respondent had knowledge of the protected concerted complaints made by Helms regarding the scheduling of the employees at Kelly's, Helms credited testimony establishes that, along with other employees, she presented scheduling complaints to both Lang and Henry. Board law is clear that a supervisor's knowledge of protected activity is imputed to the Respondent, absent credible evidence to the contrary. *State Plaza Hotel*, supra, at 755–757 (2006); *Dobbs International Services*, 335 NLRB 972, 972–973 (2001). As noted above, Lang did not testify in this matter. Henry's testimony regarding his meetings with Helms in which she presented scheduling complaints was vague and I do not credit it. In this regard, Henry testified that he recalled on at least one occurrence Helms raised concerns about her scheduling and wanted a particular schedule but he did not recall she raised concerns about the schedules of other employees. Accordingly, there is no credible evidence that Lang and Henry did not convey that Helms' complaints about scheduling were raised with, and on behalf of, other employees.

As noted above, Eugene Mitchell admitted that around the time that the new bartenders were hired in mid April 2015, he was informed by Henry that Helms was complaining about shift

scheduling to other employees and that she had complained about shift scheduling to him. Eugene Mitchell denied, however, being aware of concerns that Helms raised to management about other employees' shifts. Angelia Mitchell admitted that she was aware of the concerns that Helms and Flood had regarding the shifts they would be assigned because of the hiring of the new bartenders in mid-April 2015 and that both employees had expressed those concerns to Henry. Angelia Mitchell also admitted that she received an email from Henry at this time reflecting that Helms and Flood were concerned about their shifts. Angelia Mitchell also denied that she was aware that the concerns were anything more than each employee's complaint about their individual schedule.

I find that the Mitchells had knowledge of the protected concerted nature of Helms complaints about the scheduling of bartenders at Kelly's before she was discharged. Based on the admissions discussed above alone, I believe that there is sufficient evidence to establish the Mitchells knowledge of the concerted nature of Helms' complaints about the scheduling of shifts at Kelly's. The Board's decisions in *Meyers I*, supra, and *Worldmark by Wyndham*, establish that an employee's actions are concerted when they are undertaken with other employees. In the instant case both Mitchells admitted that they were aware that Helms undertook her activities regarding complaints about the schedule with other employees. In addition, I specifically do not credit the denials of both Mitchells that they were unaware of the concerted nature of Helms' complaints regarding the scheduling of bartenders at Kelly's as I find it implausible when I consider it in conjunction with the other evidence discussed above on this issue. In reaching this conclusion, I specifically note that the credited testimony of Helms establishes that at the April 30 meeting with Helms, Angelia Mitchell stated that she and her husband were aware that the entire staff was complaining about working conditions and that they would be mortified if their friends overheard the employees talking about their complaints regarding working conditions.

There is evidence to establish that the Respondent harbored animus regarding protected concerted complaints regarding working conditions at Kelly's. In this regard, Lang told Helms and two other employees in October 2014, when they complained to her as a group about scheduling issues, that complaining about scheduling was not going to get the employees anywhere and that Eugene Mitchell, "would lose his shit" if employees brought scheduling issues to him. In December 2014 Lang told Helms that if she complained to the Mitchells about the schedule, Lang would be told to take shifts away from Helms. In mid-April 2015, Henry told Helms and Flood that bringing their complaints regarding the scheduling of bartenders to the attention of the Mitchells would result in the loss of shift hours and a loss of shifts altogether. Also in mid-April, in a meeting that Henry had with Helms and Healy, Henry told Helms that sending an email to Eugene Mitchell indicating that she had earned better shifts because of her good work would not get her anywhere and was just going to anger Eugene Mitchell. Finally, at the April 30 meeting at which Helms was discharged, Angelia Mitchell told Helms that Eugene Mitchell wanted to "clean house" and fire all of the employees because of their complaints about working conditions but she had talked him out of it.

In addition to the explicit evidence regarding animus toward concerted employee complaints regarding working conditions, I note that the Respondent's handbook displays an antipathy to employee complaints about working conditions. The handbook states that an employee can be disciplined, up to and including discharge, for conduct "which adversely affects the reputation or business activities, of the restaurant. The handbook specifically lists as an example of such conduct "Criticizing, condemning, or complaining in a manner that affects employee morale."

I also draw the inference that Helms' discharge was discriminatorily motivated based on the timing of Helms precipitous discharge shortly after her series of protected concerted complaints to Henry regarding the scheduling of employees. The Board has clearly held that circumstantial evidence, such as the timing of an adverse action, supports an inference of unlawful motivation. *Mesker Door Inc.*, 357 NLRB 591, 592 (2011); *Sears, Roebuck & Co.*, 337 NLRB 443, 445 (2002).

The Respondent contends, however, that many other employees have contacted Angelia Mitchell and Eugene Mitchell about scheduling and have not been disciplined or retaliated against for doing so. In this regard, the Respondent introduced into evidence a substantial number of the emails (R. Exh. 3) from employees for the period from May 1, 2014 through the end of May 2015, that were primarily sent to Angelia Mitchell. A few were sent to Eugene Mitchell. These communications involve, for the most part, routine requests for days off, and the responses from the Mitchells. There is one email dated October 22, 2014, from Eugene Mitchell to "Kris Ale House" that involves a scheduling issue but this email involves scheduling at the "Ale house" and makes no reference to Kelly's. (R. Exh. 3. p. 61).

The Respondent also introduced into evidence a number of text messages that were sent to Angelia Mitchell's phone and her replies to those messages for the period from May 20, 2015, to March 20, 2016. (R. Exh. 4.) These messages involved matters involving the everyday operations at Kelly's. To the extent that they involve scheduling, the messages from employees reflect routine notifications such as being late work or covering the shift of another employee.

None of the emails or text messages introduced by the Respondent involved concerted protected complaints by employees regarding perceived problems regarding the manner in which the Respondent scheduled employees at Kelly's. I find that the Respondent's evidence establishing that employees sent emails an text messages to the Mitchells regarding routine matters at Kelly's is insufficient to rebut the evidence discussed above establishing the Respondent's animus toward the lodging of protected concerted complaints about scheduling.

Based on the foregoing, I find that the General Counsel has met his initial burden of persuasion and established a prima facie case of discriminatory motivation as required under *Wright Line*. I now consider whether the Respondent has met its burden to establish that it would have taken the same action against Helms, in the absence of her protected concerted activity.

In its brief the Respondent asserted that it had a lawful basis on which to discharge Helms because she made racist statements and refused to serve an African-American patron. As I have found above, there is no credible evidence that the Respondent questioned Helms about her conduct regarding that incident or that it notified her that such conduct was the basis for her discharge on April 30, 2015. In fact, Eugene Mitchell admitted that he never raised the issue of race at this meeting, let alone told Helms that this was the basis for discharge

Under all circumstances present in this case, I find that the Respondent's reliance on Helms alleged racist comment and refusal to serve an African Americans customer is pretextual. As noted above, the credited testimony establishes that Helms merely pointed out a customer and informed Hayward that the customer, who was an African-American female, was known not to tip. Helms did not indicate that she would not serve the customer. After Heyward served that customer and her companion, another African-American female, Helms asked Heyward if she had received a tip and when Heyward indicated that she did and that it was a good one, Helms replied that it must be because Heyward is also black.

Rather than investigate the circumstances of this incident regarding the service to the African-American customer and comments made by Helms to Heyward about the tip that he would receive, the credited evidence establishes that the Respondent abruptly terminated Helms and never raised this incident with Helms when she was terminated. As further support for my conclusion that this asserted reason for Helms discharge is pretextual. I note the record clearly establishes that the practice of not serving a customer quickly because the customer was known not to tip was well known to the Mitchells. In addition, the manner in which, Eugene Mitchell addressed the customer complaint that bartender Sarah Clark refused to serve the customer because he failed to tip, establishes that the Respondents normal approach to such a situation is to give the employee involved an opportunity to give an explanation regarding the circumstances of such an incident.

The Respondent also argues that it lawfully discharged Helms because she displayed a "negative attitude" that adversely affected other employees. I also find that the Respondent's reliance on this asserted reason for Helms discharge is pretextual. There is again no credible evidence that the Respondent ever advised Helms of any complaints that other employees had made about working with her prior to her discharge in order to give her an opportunity to address such complaints.. There is also no credible evidence that she was advised that a complaint by coworkers about her was a reason for her discharge on April 30.

The Board has held that the failure to tell an employee the asserted reason for an adverse employment action is a factor to be considered in determining whether an employer has established a valid defense under *Wright Line*. *D & F Industries*, 339 NLRB 618, 622 (2003). The Board has also found that an employer's failure to conduct a fair and full investigation and give an employee the opportunity to explain his or her actions before imposing discipline is a significant factor in finding discriminatory motivation. *Publishers Printing Co.*, 317 NLRB 933, 938 (1995), enfd. 106 F.3d 41 (6th Cir. 1996).

In the instant case, the evidence convinces me that the incident involving the service to the African-American female customer and the comments made by Helms to Heyward regarding why Helms believed that Heyward received a tip played no role in the decision to discharge Helms. Rather, it is a pretext designed to mask the Respondent's discriminatory motive. I further find that the Respondent's claim that it lawfully discharged Helms because she displayed a negative attitude that adversely affected other employees is also pretextual. On the basis of the foregoing, I find that the Respondent has not met its burden to establish under *Wright Line* that it would have discharged Helms if she had not engaged in protected concerted activity. Accordingly, I find that the Respondent discharged Helms because of her protected concerted activities in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By discharging Robin Helms on April 30, 2015, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Robin Helms, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Additionally, the Respondent must compensate Helms for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Taproom, Bryn Mawr, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted activity in order to discourage employees from exercising their rights under the Act.

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer employee Robin Helms full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Robin Helms whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Compensate Robin Helms for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Robin Helms in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Bryn Mawr, Pennsylvania, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 30, 2015.

(g)Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 13, 2016.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in activities on behalf of, or in support of, your fellow employees regarding wages, hours, and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Robin Helms full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Robin Helms whole for any loss of earnings and other benefits resulting from her discharge, less any net interim carnings, plus interest compounded daily.

WE WILL compensate Robin Helms for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Robin Helms, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

MID-ATLANTIC RESTAURANT GROUP LLC
KELLY'S TAPROOM

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-162385 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.